No. 10823

United States

Circuit Court of Appeals

For the Ninth Circuit.

PIERRE BERCUT and JEAN BERCUT, Individually, and as Copartners doing business as P & J CELLARS, a Copartnership,

Appellants,

vs.

PARK, BENZIGER & CO., INC., a Corporation,

Appellee.

and

PARK, BENZIGER & CO., INC., a Corporation,

Appellant,

vs.

PIERRE BERCUT and JEAN BERCUT, Individually, and as Copartners doing business as P & J CELLARS, a Copartnership,

Appellees.

Transcript of Record

In Two Volumes

VOLUME II

Pages 343 to 550

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

Rotary Colorprint, 55 Eleventh Street, San Francisco

No. 10823

United States

Circuit Court of Appeals

For the Ninth Circuit.

PIERRE BERCUT and JEAN BERCUT, Individually, and as Copartners doing business as P & J CELLARS, a Copartnership,

Appellants,

vs.

PARK, BENZIGER & CO., INC., a Corporation,

Appellee.

and

PARK, BENZIGER & CO., INC., a Corporation,

Appellant,

vs.

PIERRE BERCUT and JEAN BERCUT, Individually, and as Copartners doing business as P & J CELLARS, a Copartnership,

Appellees.

Transcript of Record

In Two Volumes

VOLUME II

Pages 343 to 550

Upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

Rotary Colorprint, 55 Eleventh Street, San Francisco

JEAN BERCUT,

Called for the Defendants. Previously sworn.

The Court: Just one minute.

Mr. Naus: Shall I proceed?

The Court: You say without waiving any rights?

Mr. Naus: I say without waiving any rights under Rule 50 I now call this witness. In other words, Rule 50 gives me the right to make a particular type of motion at one or the other time.

The Court: Yes.

Mr. Naus: I am announcing I intend to proceed with the witnesses at this point.

The Court: Very well.

Mr. Naus: Notwithstanding that I planned a motion, but I prefer the motion under the second paragraph than the one permitted under the first paragraph.

The Court: Yes.

Mr. Naus: Shall I go ahead with the witness?

The Court: Yes.

Direct Examination

Mr. Naus: Q. Mr. Bercut, in the month of June, 1943, or at any time before that, did you know that if, after January 29, 1943, you did not deliver wine to Hermann or his assignee, that they would not be able to get other wine in the market to take the [285] place of it? Did you know that?

A. No, I wouldn't know.

Q. There has been a reference here to a conference among a group of you gentlemen on April 26,

(Testimony of Jean Bercut.)

1943, down at the office of Merchants Ice & Cold Storage Company. You were one of those persons, were you? A. Yes.

Q. You all met down there at what hour, about?

A. Ten o'clock in the morning.

Q. It has been stated in the evidence so far that you were there, and your brother, Peter, Mr. Evans, and that at times Mr. Elman was in the room with the rest of you, and at other times Mr. Hermann was in the room with the rest of you.

A. That's right.

Q. When the meeting began was Mr. Hermann among all of you?

A. No; Mr. Elman was there first.

Q. Elman? A. Elman, yes.

Q. So when the meeting began it began among those people I have named, except Hermann?

A. Yes.

Q. State the substance of what was said at that first meeting at which Elman was present; the substance as best you recall it, and who said what.

A. Well, I started the talking. I told Mr. Elman in the presence of my brother, and also Mr. Evans there, that I found out that Mr. Hermann, Serge Hermann, was not honest. I found out also that he had no license to operate, and I told these facts to Elman.

Q. Mr. Elman? A. Mr. Elman, yes, sir.

Q. All right. You state what you said. Now, what did anybody else say, if anything?

A. Then Mr. Serge Hermann was called in and

(Testimony of Jean Bercut.)

I repeated the story to him, what I told Mr. Elman.

Q. When you say you repeated the story, what did you tell either Elman or Hermann was the particular story that you had heard? [286]

A. Yes.

Q. Did you tell them anything about a Mr. Feldheym? A. Yes.

Q. Tell the jury what you told them at that time, as best you recall it.

A. I told them that I received a telephone call from a wine man at the Palace Hotel, and his name was Mr. Jacobi; he was a manufacturer of vermouth, a wine man in New York. I have his card here.

Q. You can hand it to the reporter.

A. So this Mr. Jacobi called me in the butcher shop. I was working in the butcher shop at that time.

Q. All right. Don't tell us now what Jacobi separately told you; tell us only what you told Hermann or Elman that you had been told.

A. Yes. I am telling them that this Mr. Jacobi called me at his hotel room at the Palace Hotel, and he told me that he had just heard a contract existed between P & J Sellers and Chateau Montelena.

Q. Of New York?

A. Of New York. He asked me if I was the party who had signed that contract, and he also told me that Serge Hermann had offered these wines

(Testimony of Jean Bercut.)

contained in that contract; he was going to sell them to him if Park, Benziger was not going to arrive in a couple of days; he was long due already, and he was going to trade with Mr. Jacobi. So Mr. Jacobi said he wasn't going to trade with him for two reasons: because Serge Hermann was not honest; and second, because he had no license. And he said to me, "If you want to check on it, go and see Mr. Feldheym, the owner of Chateau Montelena.

Q. Of California?

A. Of California. So I went to see him. [287]

Q. Let's get back to the conference of April 26th.

A. That is it.

Q. Proceed.

A. Then I went to Mr. Feldheym and I told him, I brought my contract with me, and I—

Q. You mean this contract in evidence here?

A. Yes.

Q. Plaintiff's Exhibit No. 2?

A. Yes. I said, "I have just heard from a man from New York that you had business transactions with Serge Hermann," and he says, "To my sorrow, yes, I did." There was some transaction with Serge Hermann, and he told me at the time that he had a contract that was like ours, where Mr. Serge Hermann was involved to dispose of all Chateau Montelena wines, and they had an agreement between themselves for a carload of wine that went to Serge Hermann in New York, and when the carload of wine got there the carload was not paid for, which

(Testimony of Jean Bercut.)

he didn't pay yet for, and while the carload of wine was traveling back to New York Mr. Feldheym had to dispose of 750 cases of wine in Detroit.

Q. Detroit, Michigan?

A. Detroit, Michigan.

So being that Mr. Serge Hermann was his agent, he called Serge Hermann on the telephone and told him, "You go to —— I will provide you with power-of-attorney to go and dispose of 750 cases of wine in Detroit." So he also disposed of the 750 cases of wine and never did account for it yet at the present date. He sold also his wine. I told all that story in the office in the presence of Hermann and Elman and my brother and Mr. Evans.

Q. What did either Mr. Elman or Mr. Hermann say?

A. There is another thing that I forget. In the meantime Mr. Jacobi told me that Hermann had lost his license, and that it was [288] one of the reasons he didn't want to deal on this wine with him. So I went to the Board of Equalization and asked, I says, "How do I stand now? I sold 27,000 cases of wine to a man in New York. He had a license when he bought this wine, but he has no license now," and I say, "How would I stand?"

They told me, they said, "Do not sell any wine to him, because you are going to get in trouble; the man is out of business, you can't deliver any wine to him."

So I also told Mr. Elman and Mr. Hermann these facts.

(Testimony of Jean Bercut.)

Q. This was at the meeting of April 26th?

A. Yes.

Q. What, if anything, did either or both of them say about all this?

A. Hermann says, "If you are not satisfied with us, we cancel." Mr. Elman said the same way, "If you are not satisfied with us, why, if you don't think we are the right people, we cancel." And he looked in his pocket—

Q. Who did?

A. Elman. He said,—he look—looked in his pocket, and said, "I have the contract here. I will be willing to return it to you." After he looked in his pocket he said, "No, I haven't got it with me; it is up at the hotel room," he says, "You can come with me and I will return it, it's all right with us."

Q. Was anything said at that meeting on April 26th about any paper being prepared to sign to cancel this contract?

A. After he suggested, himself, that we should cancel that contract we—I believe it was my brother who told—

Q. Your brother Peter?

A. Peter—who ordered Evans to get up a cancellation and we would return the next day and sign it.

Q. Was there any appointment made to get together for the next morning?

A. Yes. We agreed on the time, and I went and picked up the gentlemen and drove them back to

(Testimony of Jean Bercut.)

the office of the [289] Merchants, and they proceeded to sign the cancellation of that contract.

Q. When the meeting broke up on the 26th did you meet Mr. Elman or Mr. Hermann outside the Merchants Ice Office anywhere, talk with him further? A. On the evening of the 26th?

Q. Not the evening; the afternoon.

A. Here is what happened—

Q. Did you see them previously—

A. Here is what happened. About a week prior to this day Hermann asked me if he would appreciate very much if I would entertain and take Mr. Elman to my house for dinner, which I told him—

Q. Mr. Elman asked you to invite Mr. Hermann out? A. No.

Q. Mr. Hermann asked you to invite Mr. Elman out?

A. Mr. Hermann asked me to invite Mr. Elman out; he would appreciate that very much—to my house for dinner. And it happened that same night of the 26th, it happened to be the date that we had arranged ten days previous to that, or a week previous to that. So Mr. Elman came to me and he said, "Is that all right for this fellow to come to your house?"

I said, "Perfectly all right." I said, "Sure; it's all right." So I took him. I called in the evening and I took him back. I called for them and took them to my house for dinner. That's what hap-

(Testimony of Jean Bercut.)

pened. Also, when I returned Elman and Hermann back to their room, this Mr. Elman surrendered the contract that he had promised to us to do during our discussion.

Q. This paper here, this batch of papers, Plaintiff's Exhibit No. 2 in this case, are these the very papers that Elman handed to you in the hotel on the 26th?

A. Yes, it is; that was the end, he gave them back.

Q. What, if anything, did he say to you when he handed those [290] papers back to you in the hotel on April 26th?

A. He says, "There is your contract," and he handed it to me.

Q. Now, going back for a moment to the morning of April 26th in the office there, during the conference that you had there did anybody present use the word "release," or the words "personal release," during that conference?

A. There was no such a thing. That was meant for the both of them. There was no such thing as personal release. Nobody there ever mentioned that thing.

Q. That is "release"?

A. Yes; "personal release."

Q. What word or words, if any, were used as to what was to be done with the entire contract?

A. That was to be a cancellation of the entire contract, a cancellation of the contract.

(Testimony of Jean Bercut.)

Q. Prior to Mr. Elman's handing to you, up at his hotel room, these papers here that make up Plaintiff's Exhibit No. 2, do you—had you ever, before then, seen any paper purporting to be a paper of assignment? A. No.

Q. From Serge Hermann or Chateau Montelena of New York to Park, Benziger & Company?

A. Up to the 26th we had no knowledge of this agreement that Hermann and Park, Benziger had.

Q. You mean assignment?

A. No knowledge; we were told that day.

Q. In this conference on the morning of April 26th was there some talk among you folks there about an assignment, or assigning the contract?

A. Yes.

Q. Tell us what was said by each of those present, or the substance of it as best you can, what was said.

A. Well, what happened was, I asked Hermann, I said, "Now, what is the setup of that Park, Benziger?" I said, "What is your connection; what is your setup?" And then Hermann did not answer that, but Elman did. [291]

Q. Mr. Elman answered it?

A. Yes. He said, "We have a"—what do you call it—a transfer—

The Court: Q. Assignment?

A. Assignment. "We have an assignment, but we have neglected to have you witness this assignment; we should have done that as soon as I arrived

(Testimony of Jean Bercut.)

in San Francisco. We should have had you witness the assignment of that contract, which we have neglected to do. We should have done it," he said.

Mr. Naus: Q. You all met again on the morning of April 27th at the same office?

A. That's right.

Q. You met at what time, approximately?

A. Must have been ten o'clock in the morning.

Q. Around ten o'clock in the morning. The same persons present?

A. Yes.

Q. But this time none of them were out of the room while the rest were there; they were all present at the same time?

A. That is correct.

Q. Tell us what happened on the morning of April 27th. What was said when you arrived and what was done?

A. I brought these gentlemen from the hotel and brought them in the office. As soon as we met, my brother, Peter, he was there waiting for us. As soon as we arrived there we all sat down, and then it was five copies, or six copies, of these cancellations of that contract on top of the desk.

Q. A lot of carbon copies?

A. Yes. So we each grabbed one and all looked at it, and everybody was satisfied with it. Hermann had one, I had one, my brother had one—everybody had one. So we ask him if that cancellation was satisfactory.

Q. Asked who?

(Testimony of Jean Bercut.)

A. Hermann. And Hermann said yes, and he signed it. [292]

Q. Was anything said to or by Mr. Elman in connection with the reading or signing of the cancellation?

A. Elman told him it was all right to sign it.

Q. Who told whom?

A. Elman told Hermann that it was all right to sign it.

Q. After the paper was signed,—and we are referring now to this paper marked Plaintiff's Exhibit 11, that paper of cancellation, that was the one that was there that morning—isn't it one of them?

A. What?

Q. I say, that is one of the papers that was there that morning?

A. Yes.

Q. After that was signed and turned over to you folks, what happened next at the office?

A. My brother, Pete, left, shook hands with everybody, and he went.

Q. Your brother, Pete? A. Yes.

Q. After Peter left what happened?

A. So we were sitting there; Evans was there. And they asked me if they could buy wine. I said, "Sure, you can buy all the wine you want, but it is going to be a cash price from now on," because I find out if you sell wine and they are going to pay as the car travels, or when the car arrives over

(Testimony of Jean Bercut.)

there, and if there is their own label on these bottles it means that the car is not paid for on arrival at New York and I cannot dispose of these bottles myself, because they have their labels on, that is, their own labels, and I, myself, can't do anything with the wine over there. The only thing I can do is to bring back these bottles, back to my warehouse, and go to the Federal authorities and have a permit to remove the bottles and break up the cases, and that gives us a lot of damage, a lot of trouble. I didn't want to do that. Therefore, I told these gentlemen they could have all the wine they wanted for a letter [293] of credit, irrevocable letter of credit; that is what I told them, before I put their own labels on my bottles.

Q. On the morning of April 27th there, after your brother, Peter, had left, there was Elman, Hermann, yourself, and Mr. Evans, still there?

A. Yes.

Q. And your offering of wine, then, as I understand it, was on a cash basis?

A. Yes; they have to pay.

Q. An irrevocable letter of credit before the wine was loaded and shipped? A. Yes.

Q. What price, if any, did you name?

A. At the price in that contract; I was satisfied with that.

Q. You mean the same price as stated in the cancelled contract?

A. I didn't ask for any more money.

(Testimony of Jean Bercut.)

Q. You told them they could have that same wine? A. Yes.

Q. But on cash?

A. Yes. We sold them a carload of wine later, at their request, for cash.

Q. But none of the wine covered by the contract?

A. No; that was at the time they sued us, we sold it.

Q. In that conversation there on April 27th that we are now speaking of, did you, or not, say that you would let them have three cars only, for cash?

A. No. That is what they say before. I never mentioned that.

Q. I am asking you whether you said that.

A. No.

Q. Did you limit your cash offering to Mr. Elman or Park, Benziger & Company in any way as to the amount you would let them have; did you limit it?

A. No, no; all they wanted.

Q. Did you ask any higher price for any of the wine you had on hand? A. No.

Q. On April 27, 1943, did you, or not, still have on hand all of the wine covered by the contract, Plaintiff's Exhibit 2? [294]

A. What date?

Q. April 27, 1943, and while you were in there signing up that cancellation. A. Yes.

Q. You had it still on hand? A. Yes.

Q. All of it still on hand. A. Yes.

(Testimony of Jean Bercut.)

Q. Tell me also, Mr. Bercut, whether before January 29, 1943, whether you or your brother Peter, or both, had ever before been in the wine business.

A. No.

Q. Had either you or your brother, or both, ever, before January 29, 1943, sold any wine to anybody anywhere in the world?

A. No.

Q. Before the week in which the 29th of January fell was or was not Serge Hermann a complete stranger to you? A. Yes.

Q. Before the week of January in which the 29th fell had you ever heard of Park, Benziger & Company? A. Never.

Q. About how long had you had the stock of wine on hand at the time the contract was signed up with Serge Hermann on January 29, 1943?

A. Two years.

Mr. Naus: You may cross examine.

Cross Examination

Mr. Bourquin: Q. Mr. Bercut, would you have acted any differently about the matter if you had known that Park, Benziger Company could not have replaced that wine from some other source?

The Witness: I don't get it; will you please repeat it?

The Court: Read the question.

(Question read by the reporter.)

(Testimony of Jean Bercut.)

A. No.

Mr. Bourquin: Q. It didn't make any difference to you in the way you handled it, and your concern handled their dealings in this matter, whether Park, Benziger could, or could not, have [295] bought wine at some other place, did it?

A. I don't know whether it would or not.

Q. It didn't govern your conduct in the matter, did it?

A. No.

Q. That they could or could not? A. No.

Q. Say, Mr. Bercut, did you know prior to April 26th, the date you first called our attention to, that Park, Benziger had taken over the marketing of this wine, and that you were dealing with Park, Benziger? A. No.

Q. Did you know that?

A. No information; knew nothing about it.

Q. Do you read the same mail at the office that is addressed to Peter at the office, there, or who was handling the mail on the transaction?

A. Well, we have our bookkeeper to write—

Q. What's the answer?

The Court: Read the question.

(Question read by the reporter.)

The Court: Q. Do you read the mail?

A. Yes.

Mr. Bourquin: Q. Did you know, prior to April 26th—in fact, prior to Mr. Elman's visit to San Francisco—that Park, Benziger were making

(Testimony of Jean Bercut.)

arrangements to prepare for the labels to be placed upon the wines that were the subject of this contract, that you had in storage? A. Yes.

Q. You knew that? A. Yes.

Q. Who did you think you were dealing with on February 26th when your brother, Peter, wrote the letter that is here marked Plaintiff's Exhibit No. 5? Will you take a look at it, please (handing letter to the witness)?

A. Yes. Well, I think that letter refers to Chianti wine.

Q. Yes, I know it refers to Chianti, but just go on and read it. [296]

A. Yes.

The Court: Read Mr. Bourquin's last question.

(Question read by the reporter.)

A. The 27,000 cases we were dealing on with Hermann. The Chianti wine we were dealing through the mail with Park, Benziger, on this letter.

The Court: Read the answer of the witness.

(Answer read by the reporter.)

Mr. Bourquin: Q. Is that your understanding of the letter at this time? A. Yes.

The Court: The jury will please remember the admonition heretofore given. We will continue the trial until tomorrow morning at ten o'clock.

(Whereupon an adjournment was taken until Friday, March 17, 1944, at 10:00 o'clock a.m.) [297]

(Testimony of Jean Bercut.)

Friday, March 17, 1943, 10:00 O'Clock a.m.

The Court: The jurors are present in the case of Park-Benziger Co. v. Bercut, et al. You may proceed.

JEAN BERCUT,

recalled;

Cross Examination

(Resumed)

Mr. Bourquin: Q. Mr. Bercut, calling your attention to your statement that someone called to your attention that Mr. Hermann, some experience with Mr. Hermann; do you know what I have in mind? A. Will you please repeat that?

The Court: Read it.

(Question read.)

A. Yes.

Mr. Bourquin: Q. You said that someone had phoned you at the Palace Hotel. A. Yes.

Q. You visited him? A. Yes.

Q. And he then voiced to you, you say, some complaint that you in turn voiced at the meeting on April 26th. A. Yes.

Q. Did that complaint involve Park-Benziger?

A. No.

Q. In your discussion of the matter with the man at the Palace Hotel, or from the Palace Hotel, was the name of Park, Benziger & Company mentioned by that man? A. Yes.

Q. Did that man have anything to tell you to indicate anything unsatisfactory on the part of Park-Benziger and their ability to do business?

(Testimony of Jean Bercut.)

A. No.

Q. And their habits of doing business?

A. No, sir.

Q. Let us say, first, up until the time of the meeting of April 27th, which you testified about, you had heard from no one anything derogatory about Park, Benziger & Company; is that true?

A. No. [300]

Q. You had not heard anything against them, their business reputation? A. No, sir.

Q. So far as you knew, it was perfectly all right, was it? A. Yes, sir.

Q. Yes. You had been dealing with them, Bercut Bros. had been dealing with Park-Benziger at the time and before the meeting on April 26th, had you? A. Yes.

Q. You had found them in their business relations with you perfectly all right, had you?

A. Yes.

Q. You had shipped them commodities by carload? A. Yes.

Q. And they had responded in a way entirely satisfactory to your concern? A. Yes.

Q. Now, sir, I understood you to say that when you brought this matter about Mr. Hermann to attention on April 26th you did not understand that you were then dealing with Park, Benziger & Co.; was that your testimony? A. Yes.

(Testimony of Jean Bercut.)

Q. You knew then who Mr. Elman was, didn't you? A. Yes.

Q. He had been introduced to you as the representative of Park-Benziger prior to that time?

A. Yes, sir.

Q. You had met him, met with him on four or five occasions, or five or six occasions prior to that time? A. Yes.

Q. On the occasion when the contract here and the matter covered by the contract were discussed?

A. What was that?

The Court: Read the question.

(Question read.)

A. No.

Mr. Bourquin: Q. You met with Mr. Elman five or six times before April 26th, had you?

A. Yes.

Q. At your place of business? A. Yes.

Q. Both at the Grant Market?

A. Yes. [301]

Q. And also at your storage plant, Merchants Ice & Cold Storage?

A. Yes.

Q. On those occasions when he was there with you, and you with him, had you not discussed this wine transaction that the contract covers?

A. Yes.

Q. You had discussed the casing and shipping of the commodities covered by the contract, had you? A. Yes.

(Testimony of Jean Bercut.)

Q. Had discussed the labeling of it, had you?

A. Yes.

Q. You had seen Peter Bercut cut one of the labels produced from Bercut Bros. on a bottle and had seen Mr. Elman cut another in the style he said was better? A. No.

Q. Don't remember that?

A. I was not there.

Q. Did Peter tell you that that transpired?

A. No.

Q. Did you hear Peter testify to that on the last trial of this case?

A. I don't remember, sir.

Q. Prior to your meeting on April 26th, correspondence had passed between Bercut Bros. and Park-Benziger? A. Yes.

Q. You had seen the correspondence?

A. Yes.

Q. Who handled the correspondence, you or your brother, Peter?

A. Well, my brother, Peter, dictated the letters and I seen the letters.

Q. You saw them. Were you present when they were dictated?

A. No. I saw the copies.

Q. Did you see the letters that came in from Park-Benziger?

A. Yes.

Q. You saw them signed by the president, Mr. Benziger? A. Yes.

(Testimony of Jean Bercut.)

Q. You saw a letter signed by Mr. Elman, the vice-president?

A. I don't remember that.

Q. You don't remember that? A. No.

Q. You knew when Mr. Elman was in San Francisco that he was here [302] as a representative of Park-Benziger? A. Yes.

Q. When you had received this detail, or this story about Mr. Hermann which you say in no wise involved Park-Benziger, whom did you first take that matter up with, Mr. Elman or Mr. Hermann?

A. Mr. Elman.

Q. Mr. Elman? A. Yes.

Q. In the meeting on the 26th when Mr. Elman and Mr. Hermann, as they had the days before, arrived at the plant, in order to bring up that matter you asked Mr. Elman to come in privately, and you asked Mr. Hermann to wait outside?

A. Yes, that's right.

Q. At that time you voiced to Mr. Elman your dissatisfaction with Mr. Hermann? A. Yes.

Q. As you said yesterday, you told him this tale, or story, at some length, about what you had heard about Mr. Hermann? A. Yes.

Q. By the way, when had you first heard that information about Mr. Hermann?

A. Mr. Hermann.

The Court: When had you first heard that about Mr. Hermann?

A. It was a few days prior to the 27th; I don't remember the date; a few days before the 26th.

(Testimony of Jean Bercut.)

Mr. Bourquin: Q. Well, how many days would you say?

A. Well, I would say four days.

Q. Four days? A. Yes, four or five days.

Q. You met with Mr. Elman and Mr. Hermann between that time and the 26th, had you?

A. Yes, sir.

Q. But it was on the 26th when you first voiced the matter at all?

A. When I first finished my investigation with the Board of Equalization, which they asked me three days to answer that matter, and by the time I went through all the records with Mr. Feldheym, the letters and files, the correspondence between [303] Hermann and Feldheym, and my investigation was complete on Saturday, the Saturday previous to the 26th. The 26th was on Monday morning, and my investigation was finished on Saturday noon.

Q. In the course of your investigation of that information did you encounter anything derogatory to the business repute or habits of Park-Benziger?

A. Well, I find out they were not any too well financed.

Q. You did find that out?

A. Yes; my bookkeeper got that information.

Q. When did you find that out?

A. That was also at the same time.

Q. Also at the same time? A. Yes.

(Testimony of Jean Bercut.)

Q. Do you recall giving your deposition in this action on September 2, 1943? A. Yes, sir.

Q. Your counsel, Mr. Naus, was present?

A. Yes, sir.

Q. I want to ask you concerning certain statements made at that time, at page 42.

Mr. Naus: You may proceed to show it or read it to him, as you choose.

Mr. Bourquin: Whatever you like; I will do either.

Mr. Naus: Take your choice.

Mr. Bourquin: Well, I will read it to him. If there is any question he may see it.

Mr. Naus: The deposition was given, yes. You can simply state it to him and if he wishes he may see it.

Mr. Bourquin: Q. Did you give this testimony at line 10:

> "Did you then check up to see whether Park, Benziger & Co. had any ability to perform this contract either from a financial or from a license standpoint? A. No.
>
> Q. You never checked up?
>
> A. No. [304]
>
> Q. You don't know? A. No."

The Witness: A. Yes.

Q. Did you give that testimony?

A. I stated my bookkeeper investigated and he told me he had a report that Park-Benziger were under-financed, not financed enough.

(Testimony of Jean Bercut.)

The Court: Were what?

A. Under-financed, not enough money.

Mr. Bourquin: Q. Did you give the testimony that I read to you out of the deposition?

A. What was that?

Q. Did you give the testimony at the deposition I just read to you? A. Yes.

Q. Is it true, as you said there, that at the time that you gave the deposition you had then never checked up on the financial ability of Park-Benziger to perform the contract?

A. Not myself, but our bookkeeper did.

Q. Did you know anything about the financial ability of Park-Benziger to perform the contract at the time you gave the deposition?

A. Yes. Mr. Elman, during the cancellation of the contract, explained to us that they did not have any money to pay cash, because they had money that was frozen in England, or in Scotland, or some place, and their present cash, they had no present cash; Elman told us that during the time we do business on the cancellation.

Q. When you gave the testimony why didn't you mention, if you knew anything at all, as to the financial ability or integrity of Park, Benziger & Co.?

A. Well, I am telling you what I find out from my bookkeeper, and also Mr. Elman, himself.

Q. Well, had you found that out from your bookkeeper before September 2, 1943, when you testified under oath that you did not know anything

(Testimony of Jean Bercut.)

of the financial ability or integrity of Park, Benziger & Co. [305]

A. Well, I might have said so, but that is what my recollection is now.

Q. What has caused you to make the correction between September 2nd and the present time?

A. Well, as I remember these things as they happened, and as we talk about it, as we remember it, try to remember about what did happen.

Q. Do you mean to be understood, you say, that at the time of the deposition you had simply failed to remember that you had had some information on that subject; is that correct?

A. Yes.

Q. Now, Mr. Bercut, when you talked with Mr. Elman on April 26th privately, and before you said anything about the matter to Mr. Hermann, concerning Mr. Hermann, did you say, when you testified, to Mr. Elman that there was any question in your mind about the ability of Park, Benziger & Co. to perform that contract? A. No.

Q. You did not? A. No, sir.

Q. In other words, at the meeting on April 26th, where you contend now that you voided your contract, there was nothing said by you to Elman concerning the ability of Park-Benziger to perform that contract, was there?

A. No, I never said anything, but he said it, himself, that he didn't have the cash.

Q. Let me read you your testimony, something

(Testimony of Jean Bercut.)

from your testimony on the last trial concerning that subject; page 75, Mr. Naus, of the transcript of the last trial. I will proceed as I did before, unless you have some objection, Mr. Naus. At page 75, line 25, I will read you the question there—I think I will go back to pick up the context of it at line 13. Question by Mr. Breslauer:

"Q. I believe in your testimony you stated, Mr. [306] Bercut, that you offered Mr. Elman some wine. I am referring now to April 27th.

A. That is right.

Q. After that document was executed. Now, what wine did you offer to him and at what prices?

A. The contract price, $5.25.

Q. And what wines?

A. The wines that were in that contract.

Q. Did you limit in any way the amount of wines that you offered to him that way?

A. No, give him all the wine he wants.

Q. Did you offer to him three cars and no more? A. No.

Q. Did you offer to him wines at a higher price? A. No, sir, no, sir."

The Witness: That's right, correct.

Mr. Bourquin: (Resumes reading):

"Q. If you wanted to give him all the wine that he wanted, why didn't you go ahead with the contract with Park, Benziger & Co.?

(Testimony of Jean Bercut.)

A. Well, it didn't look so good with Hermann, what I found out, been so bad actors, you know, robbing everybody. It wasn't interesting, never pay for anything that they had purchased ever.

Q. And that was your only reason for not going ahead with the contract with Park, Benziger & Co.?

A. Yes—well, that was Mr. Elman's suggestion that we cancel that contract. He suggested it.

Q. Your dealings with Park, Benziger & Co. on the sale of Chianti wine up to that time had been entirely satisfactory, had they not?

A. Yes, sir. Well, we were willing to proceed and sell them more wine."

Was that your testimony at the earlier trial?

A. Yes.

Q. Is it true, that the dissatisfaction which precipitated your [307] action on April 26th related entirely to Hermann and in nowise involved Park, Benziger, your relations with Park, Benziger?

A. It was two reasons why we—

Q. Just a moment. Please answer "Yes" or "No," and if you wish you may explain your answer.

A. The reason we didn't want Hermann—

Q. Just a moment.

A. Yes, Hermann, for one reason, and then—

Q. Let me ask the question again: Is it or is it

(Testimony of Jean Bercut.)

not true that the dissatisfaction which prompted your action on the 26th related entirely to Hermann and had nothing to do with Park-Benziger?

A. It had to do with Park-Benziger, too.

Q. It did have to do with them? A. Yes.

Q. Let me read you your testimony from the trial again:

> "Q. And that was your only reason for not going ahead with the contract with Park, Benziger & Co."—your reference to Hermann—and your answer was:
>
> "Yes."

Did you give that testimony? A. Yes.

Q. Was that correct when you gave it?

A. Yes.

Q. Has anything happened between trials to lead you to believe it should or could justifiably be corrected.

A. Yes. We found out Park-Benziger was not financed and that when they put their labels on our own bottles we can't control those bottles any more, we can't do anything.

Q. When did you find that out, since the last trial?

A. No; Mr. Feldheym, the man who lost his wine, is here sitting in the court-room. He told me before that.

Q. When did he tell you that?

A. The first meeting.

Q. Why didn't you tell that when your deposi-

(Testimony of Jean Bercut.)

tion was taken? You said you didn't know anything about Park-Benziger's ability to [308] transact business.

A. I am talking about what Feldheym—

Q. Why didn't you tell us that at the trial when you said your relations with Park-Benziger were entirely satisfactory?

A. Yes.

Q. And you were perfectly willing to go ahead and sell them all the wine they wanted.

A. At cash price, yes, all they want. In fact, they bought wine while they were suing us for the price agreed on which we delivered, and we were very happy about it.

Q. Do you suggest now that Mr. Feldheym told you something about Park-Benziger rather than Hermann? A. No.

Q. Or in addition to Hermann? A. No.

Q. Nothing about Park-Benziger?

A. Feldheym never had anything to do with them. [309]

Q. Why did you take your complaint about Mr. Hermann up with Mr. Elman instead of Mr. Hermann?

A. I wanted Mr. Elman to know what we found out about him.

Q. Will you explain why you wanted him to know that, let us say, first?

A. I don't remember exactly what was the purpose at the time, but we agreed to do it that way,

(Testimony of Jean Bercut.)

to tell Mr. Elman what we found out about Hermann.

Q. Who agreed to that? You say "we agreed" to that. Who do you mean? You and your brother Peter? A. Yes.

Q. In other words, you and your brother Peter agreed that you would tell Mr. Elman what you found out about Mr. Hermann?

A. That is right.

Q. With no intention of telling it to Mr. Hermann at all, isn't that true? A. Oh, yes.

Q. Wasn't it at Mr. Elman's request that you later brought in Mr. Hermann and repeated the same charge to him?

A. No, sir, at our own request.

Q. What?

A. At our own request we called in Mr. Hermann after that and we told him what we found out about him.

Q. Let us leave that for a moment this way: There is no question about it but when you and Peter decided the information you had received about Mr. Hermann was cause for concern to you, you took that up with Mr. Elman first?

A. That is right.

Q. And not Mr. Hermann?

A. Correct.

Q. That is true.

A. That is true.

Q. That was before you procured the contract

(Testimony of Jean Bercut.)

Plaintiff's Exhibit 2 from Mr. Elman, wasn't it?

A. It was before, yes, sir.

Q. I understood your testimony of yesterday to be that you never saw the assignment in writing prior to Mr. Elman's giving you the Plaintiff's Exhibit 2, to which it is attached, [310] when you took him to this hotel on the afternoon of April 26; is that true?

A. Right you are. Never seen it before; never knew it existed.

Q. It was prior to that and, let us say, as you say, your knowledge of it as such, that you took up with Mr. Elman your dissatisfaction with Mr. Hermann? A. Yes.

Q. That is true. Mr. Bercut, when this document that has been called by various names and is labeled "Agreement," Plaintiff's Exhibit 11, signed by Peter Bercut and by Serge Hermann—when that document was prepared and submitted to Hermann for signature you had in your possession Plaintiff's Exhibit 2, consisting of the original contract, the supplemental agreement, and the assignment from Mr. Hermann to Park, Benziger & Company, didn't you? A. Yes.

Q. Is there anything in this instrument, Plaintiff's Exhibit 11, that you contend refers to Park, Benziger & Company? A. No.

Q. This instrument was prepared by whom, this agreement Plaintiff's Exhibit 11? We have termed it "release," and the other side has termed it "cancellation." By whom was it prepared?

(Testimony of Jean Bercut.)

A. Mr. Evans.

Q. Mr. Evans, your accountant and bookkeeper? A. Yes, sir.

Q. At whose direction?

A. Well, mostly his own. He heard the conversation. He received instruction by Elman, by Hermann, and by ourselves during the preceding meeting on the 26th, and he made this thing accordingly.

Q. He received instructions, you say, by Elman? A. Yes, sir.

Q. Was your employee taking instructions from Elman at that time? A. Yes, sir.

Q. Did you or Peter give him any instructions for the [311] preparation of it?

A. Yes, sir.

Q. Did you or Peter tell him what was to go in it?

A. According to what we had agreed in those talks.

Q. Did you or Peter tell him who were to be the parties to this agreement?

A. Well, Mr. Evans was present at all of these talks, and he—

Mr. Bourquin: I move that the answer be stricken as not responsive.

The Court: It may go out. Read the question.

(Question read.)

(Testimony of Jean Bercut.)

A. It wasn't—no further instruction to Evans except those that took place at the meeting.

Mr. Bourquin: I will ask that the answer go out as not responsive.

The Court: It is not responsive. Answer as directly as you can, and then if you wish to explain your answer you may. The answer will go out. Read the question again.

(Question reread.)

A. No.

The Court: Now, if there is anything you wish to explain, you may.

The Witness: Yes. The way it went, Evans was instructed by all of us that the cancellation of the contract that we made should be ready for the next morning. That is the last thing we said when we quit that conference.

Mr. Bourquin: Q. Let us ascertain who did tell Mr. Evans the parties to the agreement he was to prepare.

A. He had full knowledge of the parties involved.

Mr. Bourquin: I will move that that be stricken as not responsive. [312]

The Court: It may go out. Read the question.

(Question read.)

The Court: Q. Was there anything said about that?

A. There was nothing further said. My brother didn't stay after that conference to in-

(Testimony of Jean Bercut.)

struct Mr. Evans anything further. We all left at that time. All Evans received, he received at that conference. I know I didn't stay one second later. I went out and took them to their hotel.

Q. Did anybody say, "Mr. Evans, prepare a cancellation of the contract"? A. Yes.

Q. Who said that?

A. Peter Bercut instructed him first, Mr. Hermann agreed, Mr. Elman agreed, and everybody did.

Q. You say Mr. Elman agreed?

A. Yes, he did agree.

Q. What did he say?

A. He said, "That is o.k. If you people aren't satisfied, you have no confidence in us, the way we do, you can have it. I will return your contract and it is over with."

Q. Do you wish to tell the jury that at this conference at which Mr. Elman was present, Mr. Pierre Bercut was present, you were present, Mr. Evans was present— A. Yes.

Q. Was anybody else present?

A. Hermann.

Q. Mr. Hermann was present.

A. And Elman.

Q. Mr. Hermann was there? A. Yes.

Q. He heard what was said? A. Oh, yes.

Q. And Mr. Peter Bercut said, "Prepare a cancellation of the contract"? A. Yes.

Q. And Mr. Elman acquiesced?

(Testimony of Jean Bercut.)

A. He agreed, sure.

Q. Was anything further said about it?

A. No, we left.

Mr. Bourquin: Q. The day this instrument, Plaintiff's Exhibit 11, the agreement, was presented to Mr. Hermann for [313] signature did you drive Mr. Elman to the plant that morning?

A. Yes, sir. Yes, sir; I drove both of them down. I picked them up at their hotel and brought them down to the Merchants.

Q. To the what?

A. To the office of the Merchants.

Q. Who was there when you arrived?

A. Evans and Peter Bercut were there.

Q. Evans and Peter Bercut? A. Yes.

Q. When you went in did you find this agreement, Plaintiff's Exhibit 11, had been prepared?

A. Yes, sir.

Q. It was there with Peter Bercut and Mr. Evans, was it?

A. Yes, sir.

Q. I understand you to say that Mr. Elman told you it was perfectly agreeable with him for you to cancel the contract?

A. Yes, sir.

Q. With Mr. Hermann, or did he mean to blow up his contract, the contract of his firm, Park, Benziger & Company?

Mr. Naus: One moment. Objected to as call-

(Testimony of Jean Bercut.)

ing for the conclusion of the witness as to what Elman meant.

The Court: Sustained.

Mr. Bourquin: I will reframe the question.

Q. Did Mr. Elman state—do you want to be understood as saying that Mr. Elman told you to prepare a cancellation of the agreement with his company, Park, Benziger & Company?

A. No.

Q. He was perfectly willing that Mr. Hermann be eliminated from the transaction, was he?

A. He was perfectly happy to be eliminated himself. He returned me his contract.

Q. Why didn't you put the company's name in that if he was?

A. We had no business with Elman—I mean with Park, Benziger at the time.

Q. Was that the agreement? Do you want to be understood that [314] that was agreed on the 26th, the day before Hermann signed the instrument? It was agreed by Elman he was perfectly willing to surrender his own company's rights in the matter?

A. He did surrender them. He gave them to me.

Q. Did you agree there an instrument would be prepared, an agreement would be prepared for signature?

A. Between Park, Benziger and us?

Q. Did you agree on the 26th that this Plain-

(Testimony of Jean Bercut.)

tiff's Exhibit 11 would be prepared and be signed?

A. Yes.

Q. Did you agree that it would be signed the next day?

A. Yes.

Q. At the offices? A. Yes.

Q. You made that agreement at your meeting of April 26, did you?

A. Correct; that is right.

Q. Will you tell us why you could not wait for Mr. Elman to come in the office on the 27th to give you the contract if you attached importance to its possession?

A. It was this way on this contract: He looked in his pocket, as I told you previously, and he looked all over, and he said, "I am returning you the contract. We are through." He looked through his pockets; he didn't find any contract. He said, "I must have left it in my room. You come up with me and I will give you the contract."

I went up with him and he returned me that contract.

Q. Were you in a hurry to get it?

A. Not in any more hurry than doing any other thing. He promised to give it to us; that is all.

Q. Did you ask Mr. Elman to sign this agreement, Plaintiff's Exhibit 11? A. No.

Q. You did not ask him to sign it?

A. No. [315]

Q. How long have you been in business, Mr. Bercut?

(Testimony of Jean Bercut.)

A. Thirty years.

Q. How many enterprises have you been connected with?

A. Many.

Q. How many?

A. Well, I would say the meat business, the hide business, the wine business, the real estate business.

Q. Have you executed contracts for your own business? A. Yes.

Q. Many? A. Many.

Q. Many, many?

A. Oh, yes. I never had any trouble with any of them.

Q. Will you give us, please, any reason that you can that this agreement which you characterize here as a termniation of your relations with Park, Benziger was prepared and executed between Bercut Brothers, Serge Hermann, and no one else? You prepared it. A. Yes.

The Court: Read the question.

(Question read.)

A. Yes, that was between Serge Hermann and ourselves.

Mr. Bourquin: Q. Well, I am taking your view of the matter that you wanted to or you believed you were also severing your relations with Park, Benziger. What is the reason that the agreement was limited to Bercut Brothers and Serge Hermann?

(Testimony of Jean Bercut.)

A. We didn't think we had any relation at all with Park, Benziger on that contract.

Q. Why did you take up the dissatisfaction with Hermann with Elman, Park, Benziger's man, if you did not believe you had anything to do with them on that contract?

A. Why did I take it up with him?

Q. Yes.

A. Because Elman, to our knowledge, was their customer. We sold them—we offered some wine to Hermann, he sold it to [316] Park, Benziger. We understood also Park, Benziger was going to have this wine.

Q. Did you know then of the assignment to Park, Benziger when you caused the plaintiff's Exhibit 11 to be prepared?

A. We had to find out during our conversation that Hermann became partners with Elman—with what you call it, Park, Benziger—Park, Benziger, you call it?

Q. For our record to be clear, I want to put the question again: Did you know when you caused the Plaintiff's Exhibit 11 to be prepared—

A. Yes.

Q. —did you know then of the existence of the assignment?

A. Yes.

Q. Of the contract of Park, Benziger?

A. We found out that day.

Q. You knew it then? A. Yes.

(Testimony of Jean Bercut.)

Q. You knew it when the instrument was presented to Serge Hermann for signature?

A. Yes.

Q. On the subject of that contract itself, Plaintiff's Exhibit 2, did Mr. Elman ask you to return it to him?

A. This contract? Yes, three or four days later, yes. He changed his mind three or four days later.

Q. Three or four days later? A. Yes.

Q. Three or four days later would mean after April 27.

A. Yes.

Q. Did you receive the formal demand prepared by Mr. Breslauer for that two days later, on April 29? A. Yes.

Q. Did you receive Mr. Breslauer's oral communication to you on April 28, one day after you mentioned seeking the document?

A. Oral conversation, no; in writing.

Q. Did your brother Peter Bercut tell you that Mr. Breslauer called and wanted it and he told him you had it? A. No. [317]

Q. He did not tell you?

A. He didn't tell me that.

Q. Did your secretary or the girl in your office give you any messages from Mr. Breslauer on the 28th or 29th prior to the service upon you of the formal demand which is here, Plaintiff's Exhibit 8?

(Testimony of Jean Bercut.)

A. Yes, I received that notice.

Q. Prior to that being served upon you on the 29th, is that correct?

A. What is the date of this thing?

Q. It is dated the 29th.

The Court: What is the question?

Mr. Bourquin: I broke my own question, your Honor. If I may put it again.

Q. When was that demand that you hold in your hand, Plaintiff's Exhibit 8, served upon you?

A. It was left in another room in the butcher shop. I found it in the butcher shop. It wasn't delivered personally to me. It was left in the butcher shop.

Q. Weren't you personally served?

A. It was left in the butcher shop.

Q. No one gave it to you personally?

A. No—my cashier give it to me.

Q. When?

A. She said, "Those papers were left here for you."

Q. When did she give it to you?

A. I don't know how many days after this 27th. I wouldn't know that.

Q. You are sure of that? A. Yes.

Q. Did you keep any record of that? Do you keep any records down in your place?

A. Not very much. We are busy with a lot of customers.

Q. You are not very much on records, are you?

(Testimony of Jean Bercut.)

A. No.

Q. You didn't keep any record of your receipt of that communication formal in its terms, did you? A. No.

Q. Now, sir, did you on April 28 receive any messages from your [318] secretary or your phone girl from Mr. Breslauer? A. No.

Q. Did you receive any messages or did she give you any calls from Mr. Breslauer or to call Mr. Breslauer on April 29? A. No.

Q. The second day after the breakup of the 27th? A. No.

Q. You are positive of that?

A. Yes; I didn't receive anything like that.

Q. Tell us, then, as nearly as you will—we want you to be definite—when did you first receive any communication seeking the return of that contract?

A. I received a telephone call from Hermann—from Elman at my house in the evening.

Q. At your house of an evening?

A. On an evening, yes.

Q. When?

A. I don't know whether it was the day after or two days later. I don't know exactly the night it was, but he called me up and told me he wanted his contract back.

Q. Let's see. You say that was a day after what date?

A. Or two days, it might have been; I don't remember.

(Testimony of Jean Bercut.)

Q. Or two days after what date?

A. The 27th.

Q. We are coming back now to the 27th. You say it was a day or two days after?

A. That Elman called me up.

Q. That Elman asked you for it?

A. Yes.

Q. What did you tell him?

A. I told him I didn't know why he wanted that contract. He give it to me; it was our property.

Q. Did you refuse it?

A. Yes, sir, I refused, sure.

Q. What did you expect to accomplish by withholding the physical possession of the contract?

Mr. Naus: Objected to as argumentative.

The Court: Sustained.

A. It was my property.

Mr. Naus: One moment, please. [319]

Mr. Bourquin: Q. You did know, didn't you, that there were other writings in existence evidencing your arrangements with Park, Benziger? You knew of the correspondence, didn't you? You knew of the correspondence between Park, Benziger and Bercut Brothers?

A. Yes, I knew the correspondence, but that was my property, that piece of paper. He give it to us in front of everybody. He promised to give it to us.

Q. Who was that in front of?

(Testimony of Jean Bercut.)

A. In front of Hermann, Peter Bercut, Evans and myself.

Q. I thought he gave it to you at the hotel.

A. He did, but he promised to give it to me.

Mr. Naus: He promised in front of everybody.

Mr. Bourquin: I would like the witness to testify.

Mr. Naus: The witness did testify to that. Objected to as attempting to distort the answer of the witness.

The Court: I do not think there is any necessity for this talk at all. Now, is there a question pending?

Mr. Bourquin: Q. You did receive it from Mr. Elman at the hotel, didn't you? A. Yes.

Q. What time of day? Early in the afternoon?

A. As soon as we left, the 26th day—the conference—I took these two gentlemen to the hotel, and the first thing I walked up with Elman to his room and he looked for this thing through his papers and delivered it to me right there and then.

Q. What time of day, do you recall?

A. That I wouldn't know. I wouldn't know exactly the time.

Q. Well, you saw him again that same day, didn't you?

A. Yes.

Q. You called for him again that same day?

A. Yes, I called for him, yes. [320]

Q. You called for him at the end of the afternoon, didn't you? You called for him at the end of that same afternoon, didn't you?

(Testimony of Jean Bercut.)

A. On the end of the same afternoon.

Q. Yes, and you called to take him to your home for dinner?

A. That is right.

Q. Is that correct? A. That is right.

Q. And you did take him? A. Yes.

Q. Mr. Bercut, who was that buyer that called you from the Palace Hotel and gave you the tale about Hermann?

A. I have got his name.

The Court: We will have a recess for five minutes. The jury will remember the admonition heretofore given. [321]

(Recess:)

The Court: The jurors are present; you may proceed, Mr. Bourquin.

Mr. Bourquin: Q. Mr. Bercut, you were going to give us the name of that man who told you the tale about Hermann.

A. Yes. The name of the firm is St. James Wines, Inc., of New York. I have here the name, Hugo Jacobi.

Q. Who was he?

A. A total stranger to me.

Q. What was his business?

A. Wine business.

Q. Did he want to buy wine from you?

A. No.

Q. Are you sure? Did he say he did?

(Testimony of Jean Bercut.)

A. He didn't say he did. He knew me—I mean he got the information from Hermann. He find out about me through Hermann.

Q. Let me ask you if on the deposition that you gave in this matter on September 2nd you testified, and I will read to you page 39:

"Q. Mr. Breslauer: Was Mr. Hermann here in San Francisco at the time?

A. At the time he had just left this gentleman that I mentioned. Oh, yes, now you put me back to what I want to think—what I want to say. Hermann said to this gentleman, he says, 'I'm waiting for a representative of Park-Benziger, and if this man does not arrive here in three days I will show you these wines and I will sell them to you.' This gentleman was out here to buy wine. He was a Vermouth manufacturer in New York. And he said to me, 'If those wines are good, why, I will naturally be interested, but I won't do business through Hermann—absolutely not. If this Park-Benziger representative he talked about don't arrive, why, I want to know a few things about this wine, what it is, but,' he said, 'I am not going to [322] purchase them through Hermann.' And I said, 'As far as I know, I don't think we can do any business, because Hermann wants these wines. We have a contract with him. However, I'm going to follow the thing up.' "

(Testimony of Jean Bercut.)

Did you testify so on your deposition?

A. Yes.

Q. Does that refresh your recollection that the man that you say gave you this information wanted to buy wine?

A. I never sold him any wine. He left here, he left the name of his man who represented him here in San Francisco, and if we want to do business separately, he was leaving for Los Angeles.

Q. But he was wanting to buy wine?

A. He was a wine buyer, yes, but he didn't want to buy wine from Hermann.

Q. But he wanted to buy your wine if he could, didn't he?

A. Well, we didn't enter into business details about it. He left with the knowledge that there was a contract between us and Hermann; therefore, there was no wine deal at all. He knew about that contract because Hermann showed him the contract, he knew every detail of that contract and everything, how many bottles of wine we had, the proportion of the wines that we had, he knew everything; he knew the contents of the contract entirely.

Q. Did he want to buy wine? Did he want to buy that wine from you, that man you referred to?

A. He couldn't buy the wine from me because I had a contract with Hermann.

Q. Did he tell you that he wanted to buy the wine from you?

A. He said, "Some day if you are free to do

(Testimony of Jean Bercut.)

business, if you contact my man in San Francisco and offer him some wine," he said, "I am in the market to buy wine."

Q. He did express a desire to buy wine, did he, or some of the wine?

A. He said, as I told you, that he left it to the salesman, to his agent here in San Francisco, to do business if we were [323] sometime or other in a position to do business.

Q. When you came away from that man, Mr. Bercut, what did you know, was he wanting to buy wine, or was he not interested in buying your wine?

A. Well, I told you exactly what happened. This man was a good friend of Mr. Feldheym, and he got interested in saving the day for me, telling me that Hermann was not the man to do business with; that is how the connection came. Mr. Feldheym is right here now. He knew Mr. Jacobi and he got interested in me because he knew all about the Feldheym deal and how Feldheym got bunked and robbed and so on by Hermann.

Q. Did he say to you, "If your wines are good I will be interested"?

A. He simply said, "Sometime if you are in a position to do business let my agent know about it."

Q. Did he say what I read to you, "If your wines are good, why, naturally, I'll be interested"; did he say that to you?

A. Yes, he will be interested, yes.

Q. Yes.

(Testimony of Jean Bercut.)

A. But the sole reason he told me that was because he was a friend of Feldheym.

Q. Whom did you say that man represented?

A. That man represented his own firm.

Q. What was the name of his firm?

A. I got the label here. It says "St. James Wines, Inc.," of New York.

Q. Is that the card he gave you at the time, the card that you produced there? A. Yes.

Mr. Bourquin: I will ask it be marked in evidence. May I have a look at it?

A. That is the card.

The Court: Do you wish the card and the label as exhibits?

Mr. Bourquin: Yes. I will ask it be marked as an exhibit. Let me see the label. I ask they both be marked. [324]

(The label and business card referred to were marked Plaintiff's Exhibit 16.)

Mr. Bourquin: Q. Now, Mr. Bercut, let me ask you if on the taking of your deposition you did not on the subject we are now on testify as follows, pages 40 and 41, counsel—to pick up the text first on page 40, to questions asked by Mr. Breslauer:

> "Was Mr. Elman, of Park, Benziger & Co., in San Francisco at that time?
>
> "A. Yes—no—wait a minute; excuse me now. Now, Elman came the next day or a couple of days later. That is, the first day that I was there, Elman didn't arrive yet.

(Testimony of Jean Bercut.)

"Q. This conversation with the man at the Palace Hotel—by the way, what was his name?

"The Witness (To Mr. Naus): Shall I give it?

"Mr. Naus: You must.

"The Witness: I must? Well, he told me not to.

"Mr. Naus: It is all right. You are under oath now and you are in court. Go ahead and answer it.

"A. Blum.

"Mr. Breslauer: Q. The first name?

"A. Blum.

"Q. His first name, do you know?

"A. No. He was a manufacturer of Vermuth in New York.

"Q. B-l-u-m? A. Yes.

"Q. Mr. Blum. The conversation with Mr. Blum and the conversation with Mr. Feldheym took place a day or so before Mr. Elman arrived? Is that right? A. Yes."

Did you give that testimony? A. Yes.

Q. On the taking of your deposition?

A. Yes.

Q. Was it true? A. Yes. [325]

Q. Is the truth that when you talked to the man at the Palace Hotel who told you the tale about Hermann that that was before Mr. Elman arrived in San Francisco?

A. That's right.

(Testimony of Jean Bercut.)

Q. Now, tell us what you say the man who gave you the story, what his name was; was it Jacobi, or was it not?

A. It was Jacobi.

Q. It was Jacobi.

A. I got his card.

Q. Why did you tell us on the taking of the deposition that he was a manufacturer of vermuth in New York by the name of Blum?

A. The thing was I lost the card and label and everything else and I thought his name was Blum up until I checked over all the records and everything else and I found his name was Jacobi.

Q. When did you check to find his name was not Blum but it was Jacobi?

A. After I talked again to Feldheym and after I find my records, my cards and everything else.

Q. When did you find the record that would justify your correction of the name from Blum to Jacobi?

A. When did I find it?

Q. When did you find it?

A. Between the last trial and this trial.

Q. Between the last trial and this trial?

A. Yes.

Q. Let me ask you, Mr. Bercut, do you know a man by the name of Henri, as the French spell it, Behar? A. Yes.

Q. Who is Henri Behar?

(Testimony of Jean Bercut.)

A. Henri Behar, he is a wine merchant from New York.

Q. Whom does he represent?

A. He represents the Vintage Wines of New York.

Q. The Vintage Wines of New York. Did you make any commitment for the sale of the wine covered in this contract to the man that you talked to in the Palace Hotel and who told you the tale about Hermann? A. Repeat that? [326]

The Court: Read the question.

(Question read.)

The Witness: If I offer him the wine?

The Court: Did you make any commitment?

A. No, no.

Mr. Bourquin: Q. Are you sure?

A. No.

Q. Wasn't the man that you referred to here, Henri Behar, whom you saw at the Palace Hotel at the time you say you received that tale about Mr. Hermann?

A. Mr. Behar came—

Q. Answer "Yes" or "No." A. No, no.

Q. Didn't you sell these same wines to Mr. Behar and didn't he pay you $10 a case—

Mr. Naus: One moment.

The Witness: A. No.

Mr. Naus: I object to the allusion to $10 a case on the part of counsel as misconduct, and assign it as misconduct, and ask the court to give an ad-

(Testimony of Jean Bercut.)

monition with respect to it. Further, I object to the question as an attempt to renew the effort to go into sales of these wines subsequent to April 27, 1943; I object to it on all the grounds previously stated, and I might add, if the Court please, that you probably may recall that in the former trial there was a reference to some five carloads or ten carloads of wines, I forget at the moment the number, at the other trial, of vintage wines that went up to Idaho, and they are also included within that schedule that is marked for identification, so if there is an attempt now under the guise of cross-examination to get away from the conversation at the Palace Hotel, and ask about sales of wines to someone out of the same lot since, I renew my objections heretofore made.

Mr. Bourquin: May I be heard, your Honor?

The Court: Yes. [327]

Mr. Bourquin: Your Honor please, preliminarily, this witness testified that at the time of the break-up of the contract he was ready and offering to sell Park-Benziger all the wines they wanted. He also said that he was ready to sell them to them at the same prices fixed by the contract. Now, we pursue the examination, to which Mr. Naus complains, your Honor, believing we are entitled to show the real reason and the real motive behind the events of April 26th and 27th which they claim cancelled their arrangement with Park-Benziger, to impeach the witness' reason given here, and to

(Testimony of Jean Bercut.)

show the real reason and motive. I think we are entitled to it. I want to add further to that, your Honor, I want to show in that connection that at the time Mr. Elman was in San Francisco, and at the time of the events that transpired on the 26th and the 27th these people then knew they could dispose of this wine elsewhere to much greater advantage, and that certainly is motive, I would say, in our theory of the case, of course certainly is motive for the events which transpired on the 26th and 27th.

Mr. Naus: I would like to add to the objection previously made that in connection with the assignment of misconduct and request for admonition, I would like to add further that all of the documents relating to Mr. Henri Behar, the bills of lading, invoices, and everything, they are in the schedule, here, and counsel for the plaintiff, other than Mr. Bourquin, who came into the present trial, have been fully informed about it, and that there is no basis whatever, in truth or in fact, for any suggestion that any wines were ever sold for $10. The implication in the question is based upon a falsehood.

The Court: I don't see why you are injecting that $10 proposition here. Is it an attempt to show the wines were sold [328] for that figure for the purpose of proving any loss?

Mr. Bourquin: Not for that purpose, at all. It may be, as Mr. Naus suggests, conflicting with the

(Testimony of Jean Bercut.)

ruling of your Honor on the question of damages, but, nevertheless, believing we are entitled to show whether it is $10 or $8.50, or what, merely that these people knew at the time they went into the meeting on April 26th with Mr. Elman and Mr. Hermann, that the market on these wines was rising, and had risen, and they could and did sell for prices much above the contract prices; that that furnished the motive.

The Court: Why not eliminate the figure of $10 in that question?

Mr. Bourquin: If I could merely reduce it to a price above the contract price I would, your Honor.

The Court: Yes. I think I will permit the question, if you will just eliminate that portion. The objection of Mr. Naus is overruled. I do not think there is any misconduct here. You may proceed.

Mr. Bourquin: Q. Mr. Bercut, didn't you sell the wines covered by the contract in Plaintiff's Exhibit 2 to the concern represented by the man at the Palace Hotel that you say gave you the tale about Hermann at prices in excess of the contract price? A. No.

Mr. Naus: You mean all the wines, or some?

Mr. Bourquin: I will say most of them.

The Witness: A. No.

Q. I will say 85 per cent of them.

A. No.

(Testimony of Jean Bercut.)

Q. Let me ask you this: When you went into the meeting on April 26th with Mr. Elman and Mr. Hermann, didn't you know that those wines then would command a better price than was agreed upon in [329] the contract made January 29th?

A. No.

Q. Didn't you sell Mr. Harry Rathjen, who testified here yesterday, some of the wines, some wines covered by the contract here in issue, at a price in excess of the contract price?

Mr. Naus: Objected to on all the grounds previously stated; further, that the question is unlimited in its form and not confined to any attempt to sell or to any sale before April 27, 1943.

Mr. Bourquin: Mr. Rathjen testified he was offered those wines about April 20th, or before.

Mr. Naus: I know, but your question is confined to sales. Mr. Rathjen didn't testify to any sales. [330]

The Court: Objection overruled.

(Question read.)

A. Yes, at a later date, much later date; in May or sometime.

Mr. Bourquin: Q. In May? A. Yes.

Q. Did you sell any of the wines covered by the contract to the Spreckels Market prior to April 27th? A. No, sir, absolutely not.

Mr. Bourquin: That is all the cross-examination, your Honor.

Mr. Naus: No questions.

W. G. EVANS,

Called for the defendants. Sworn.

The Clerk: What is your full name?

A. W. G. Evans.

The Clerk: What is your address?

A. 2271 26th Avenue.

Direct Examination

Mr. Naus: Q. Mr. Evans, you are connected in business with the defendants, are you?

A. Yes, sir.

Q. And have been for how many years?

A. Twenty years.

Q. In what capacity?

A. Various capacities in the twenty years.

Q. State generally the nature of your connection.

A. General manager of the Merchants Ice & Cold Storage Company.

Q. The Merchants Ice & Cold Storage Company is simply one of many activities, is it not?

A. Of the Bercut brothers, yes.

Q. When you say "Bercut brothers," you mean Peter and Henri rather than Peter and Jean, don't you, of the Merchants Ice?

A. I mean Bercut brothers, the three of them.

Q. The three of them together. The Bercut brothers took over the majority control of Merchants Ice in January 1941 and took over the management in February 1941, isn't that right?

A. February 1, 1941.

(Testimony of W. G. Evans.)

Q. So you have been general manager of the Merchants Ice only since the early part of February 1941? A. That is right.

Q. What other activities, major activities, have you been connected with in Bercut Brothers as an associate or as an employee?

A. I have attended to the financial matters in most of the enterprises.

Q. The Grant Market on Market Street?

A. Yes, sir.

Q. What else? State specifically.

A. Bercut-Richards Packing Company, Sacramento; English Estate Company; Markets [331] Investment Company; Bercut Bros.; P. & J. Cellars; Chateau Apartments; Celeste Apartments; Tiffany Apartments; 2166 Market Street; properties in Richmond; the Arco Apartments, 20th Avenue Apartments.

Q. Prior to this wine contract with Serge Hermann on January 29, 1943 and throughout the twenty years you had been with the Bercut Brothers, had they ever at any time been in any wine deal before? A. No, sir.

Q. Prior to this contract with Mr. Hermann on January 29, 1943, and in the twenty years over which your association and knowledge goes, had they ever at any time sold so much as a bottle of wine to anybody in the world?

A. Not to my knowledge.

Q. Beginning with February 1, 1941—I believe

(Testimony of W. G. Evans.)

you personally have had your office, the physical space for those various things you attend to, down at the Merchants Ice & Cold Storage Company?

A. Yes, sir.

Q. Among your other activities you act as general manager of the Merchants Ice & Cold Storage Company, beginning with the change out of the old management and the coming in of the Bercut management in February 1941, is that correct?

A. Yes, sir.

Q. Now, you have been named as being among those present at the conferences of April 26 and 27, 1943. You were present, of course, weren't you? A. Yes, sir.

Q. As has been indicated in the testimony here, on April 26 the first of what might be called a series of conferences occurred, which was participated in by Mr. Elman but not by Mr. Hermann. Now, addressing your answer to that phase of the meetings on that day, tell us what was said and by whom as best you can while Hermann was still out of the room and Mr. Elman was still in there.

A. The meeting took place on I think it was a [332] Monday at ten o'clock in the morning, and the Bercuts had decided to ask Mr. Elman in first at the meeting and asked Mr. Hermann to wait until a little later.

Mr. Elman came in the office, and Peter Bercut asked Mr. Elman, "What do you know about this man, Mr. Herman? How long have you known

(Testimony of W. G. Evans.)

him?" He said, "My brother Jean gets some very bad reports about Mr. Hermann. If Jean says he hasn't financial responsibility, I don't hardly think it would be good busines for either you or us to do anything with Hermann. How long have you known Hermann?"

"Oh," he says, "some time, a short time."

"What kind of relations do you have? What is your setup between you fellows? Are you partners, or what is your relationship?"

Mr. Elman said, "Well, sort of. Mr. Hermann is in fifty-fifty. He is in for fifty per cent of the net profits."

"Yes," or something like that — "Yes. Well, the reports we get on Mr. Hermann, he is very bad. Apparently local people here in San Francisco have had some very bad experiences with Mr. Hermann."

"Well, I am surprised," Mr. Elman said. "I don't know much about him, but if you people aren't satisfied," Mr. Elman said, "if you people aren't satisfied with him I suppose we can call the thing off."

Mr. Peter Bercut said, "Well, let's call him in here. Jean, go and call Mr. Hermann in here and see what he has to say."

Then Mr. Hermann came in.

Q. Hermann was then called in?

A. Yes.

Q. From the time Mr. Hermann stepped in

(Testimony of W. G. Evans.)

the room, at that point, [333] tell us what was said, the substance of it, by the various persons from that time on.

A. Well, it was quite a stormy—I am not quite sure—my impression is that Mr. Elman went out of the room for a while.

Q. Are you sure one way or the other?

A. I am not sure, but I think I testified the last time that he did.

Q. Tell us the substance of what was said.

A. It was quite a stormy meeting there. Jean was quite vehement in stating Mr. Feldheym had had some very bad experiences with Mr. Hermann, that there was a car of wine went to New York.

Q. From California?

A. From California, belonging, I understand, to Mr. Feldheym, and Mr. Hermann sold it in New York, but that he claimed the wine was cloudy. Mr. Feldheym didn't get a penny out of that cloudy wine.

Then there was some other instance in Detroit where there was some wine belonging to Mr. Feldheym or some friend of his that they asked Mr. Hermann to sell, and there was no return from that sale either.

Jean was quite vehement about the financial responsibility of Mr. Hermann, and Mr. Hermann was rather indignant, too, because Mr. Hermann said that was a personal matter. If he had a busi-

(Testimony of W. G. Evans.)

ness dispute or a personal dispute, that was his personal affair and nothing to do with Jean.

The thing got quite fiery, and Mr. Peter Bercut interjected and said, "Jean, don't threaten. Let's not argue about this thing. There's a way out of it."

So I think Mr. Elman spoke up and said, "Yes, if you people aren't satisfied we'll cancel the whole thing," he said. "I will be out a few pennies for labels, the artist and one [334] thing and another," he said, "but if you people aren't satsified, why, we'll call the whole thing off."

Then I think Mr. Peter Bercut instructed me to write a cancellation and have it ready for the next morning. It was agreed that the whole four would be down at the office at ten o'clock the next morning.

Q. Pardon me. Had you finished?

A. That is the best of my recollection.

Q. Through the years that you have been with the Bercut Brothers, the various ones, when it comes to drawing papers, carrying on correspondence and the like, are you the man personally who generally draws the papers, writes orders, and the like?

A. Most of it, yes.

Q. Were you given any instructions with respect to drawing some paper for them to sign pursuant to this conference the following morning?

A. Yes.

(Testimony of W. G. Evans.)

Q. Who, if anyone, said anything to you about that, or what, if anything, was said to you about that?

A. Well, merely said to write a cancellation of the contract.

Q. And they all left then, leaving you at your office? A. Yes.

Q. All this took place in your personal office, your manager's office, at the Merchants Ice, did it?

A. Yes.

Q. So they all left on this occasion of the 26th, leaving you alone at the office?

A. That is right.

Q. Between that time and the following morning, when they reassembled, did you or not prepare a paper? A. Yes, sir.

Q. This one that is marked Plaintiff's Exhibit 11 in this case (handing document to witness)?

A. Yes, sir.

Q. Did you draw that entirely yourself, or did you call in some lawyer to aid you?

A. I drew that up myself. [335]

Q. It is entirely your own drafting?

A. Yes. I may have gotten parts of it from somewhere else.

Mr. Bourquin: Will you read that last answer, Mr. Reporter.

(Answer read.)

Mr. Naus: Q. Where?

A. From some other agreements.

(Testimony of W. G. Evans.)

Q. You mean a paste-box and scissors deal, something like that?

A. No; I mean the phrases aren't mine.

Q. Where did you get them?

A. From another agreement, probably the same kind.

Q. In the office? A. Yes.

Q. Did you or not in drawing that attempt to state as best you could the substance of what you had listened to on April 26?

A. Yes.

Q. Did you attempt to change in any way the substance of what you had listened to on April 26?

A. No, my instructions were not to do that.

Q. On April 26 did anybody use the word "release"?

A. Absolutely not.

Q. On April 26 did anybody use the words "personal release"?

A. Positively not.

Q. On April 26 was the word "cancel" or "cancellation" or "cancelled" used? A. Often.

Q. By whom?

A. By Peter Bercut, by Mr. Elman, by Jean Bercut.

Q. Well, they all reassembled on the morning of April 27, did they, at the same office?

A. Yes.

(Testimony of W. G. Evans.)

Q. What happened and what was said on that occasion?

A. On that occasion when they came in, the papers were read, and there was enough, I think, for everybody to read them over.

Q. Were they read?

A. They were read. [336]

Q. By whom? A. By everybody.

Q. Mr. Elman and Mr. Hermann included?

A. Mr. Elman and Mr. Hermann included, Mr. Jean Bercut, Mr. Peter Bercut, and myself.

Q. Then what happened?

A. Mr. Hermann looked at them. He said, "Well, I don't know whether I should sign this or not." He said to Mr. Elman, "Where do you come out on this thing?"

Mr. Elman said, "That is all right. Go ahead and sign it. If they aren't satisfied with us, that is all right. I will be out a few pennies, but that is all in business. I will charge it to profit and loss or something like that. I will just forget about it."

Q. Was it signed?

A. Yes; Mr. Hermann signed it.

Q. After it was signed was it handed over to you or the Bercuts, left with you?

A. Left with me.

Q. After the signing and delivery of it, what, if anything, occurred among those present?

(Testimony of W. G. Evans.)

A. I think Peter Bercut said he had some business out of town somewhere, and I think Jean—

Q. Did he leave or did he stay?

A. I think both Jean and Peter Bercut left the room for a few minutes.

Q. What happened next?

A. Jean Bercut came back.

Q. Proceed.

A. I think I was kind of preoccupied with telephone calls. At least, one thing I remember after that, "For cash"—"You can have wine for cash."

Q. What was said about that and by whom?

A. Jean Bercut and Mr. Elman.

Q. Can you recall what was said or the substance of it?

A. I forget whether it was three cars, thirty cars, or "all the wine you want," but it was for cash; I remember that.

Q. After the signing and delivery of the paper there was some [337] talk among Mr. Elman, Mr. Hermann and Jean about shipping wine for cash, but you do not recall what quantity they were talking about; is that correct? A. No, sir.

Q. Is that correct?

A. That is correct, yes.

Mr. Naus: You may cross-examine.

Cross-Examination

Mr. Bourquin: Q. Mr. Evans, you are an employee of Bercut Brothers, are you?

A. Yes.

(Testimony of W. G. Evans.)

Q. And you have been for quite a few years?

A. Twenty years.

Q. And you give all of your time to that business of theirs, do you?

A. Their various enterprises.

Q. That is your occupation, your place with the Bercut Brothers; is that true?

A. Yes, sir.

Q. Now, sir, calling your attention to the meeting of April 26 that you testified about, did any question come up in the discussion that day as to whether or not the contract was assignable?

A. Yes.

Q. Who raised that question?

A. I think Peter Bercut did.

Q. Peter Bercut raised it. Tell us just what transpired in that respect about the question coming up whether the contract was assignable.

A. I think it was the impression of everybody that the contract was not assignable.

Q. Can you tell us what was said?

A. Peter Bercut asked Mr. Elman, and I think Mr. Hermann too, to show him where the word "assign" was in there anyway in the contract.

Q. Peter Bercut asked Mr. Elman and asked Mr. Hermann to show him where in the contract it said it could be assigned, did he?

A. No; where the word "assigned" was in there.

(Testimony of W. G. Evans.)

Q. Where the word "assigned" was in the contract?

A. Or "assignable." [338]

Q. In other words, he asked him where the word "assigned" appeared that would permit the contract to be assigned; is that what you understood?

A. I couldn't say that. The exact words Peter Bercut said was, "Show me where it says in there, in the contract, where they use the word 'assigned' anyway."

Q. What question was before the meeting? The question of whether or not it was assignable?

A. I think that is the first time that Mr. Elman told the Bercuts that there was an assignment.

Mr. Bourquin: I ask that be stricken and ask the witness be instructed to answer the question.

The Court: Denied.

Mr. Bourquin: Q. What was the question before the meeting? Was it the assignability of the contract?

The Court: How did this question come up as to the assignability of the contract? Who brought it up?

A. I think Peter Bercut. It came up in connection with, "What was the relations between Elman and Hermann?"

Q. Peter Bercut brought the question up, did he? A. Yes.

Q. Did Peter Bercut say or challenge the assignability of the contract?

(Testimony of W. G. Evans.)

A. I don't think it was necessary.

Q. Did he?

A. I think he did.

Q. In other words, Peter Bercut had voiced the contention that the contract was not assignable?

A. I think he did.

Q. The parties discussed that question, did they?

A. Not much.

Q. Not much? Did Mr. Elman have anything to say about it?

A. He was looking for the word there. I don't remember him saying anything.

Q. In any event, when the question was raised about Mr. Bercut the parties got out the contract, did they? A. My copy of it, [339] yes.

Q. And went over it looking for the word "assignment"?

A. That is right.

Q. Who did that?

A. All of them, I think—Mr. Peter Bercut, Mr. Hermann and Mr. Elman.

Q. All searching for the answer to the question that Mr. Peter Bercut raised, is that it?

A. Well, on the relationship, see?

Q. On that day, Mr. Evans, at that meeting of April 26, was the question of dissatisfaction with Park, Benziger raised, or was it merely a matter of dissatisfaction with Hermann?

A. I don't think the point was raised. There

(Testimony of W. G. Evans.)

was plenty of dissatisfaction with Hermann. I am positive of that.

Q. There was plenty of dissatisfaction with Hermann? A. Yes.

Q. But in the meeting of the 26th no dissatisfaction with Park, Benziger was uttered, was it?

A. Not to my knowledge.

Q. And you were present all through the meeting?

A. I think so—most of the time, yes.

Q. And until the parties retired?

A. What?

Q. Until they retired? Until Mr. Jean Bercut took Mr. Elman and drove him to his hotel?

A. Well, I have other things to do there. There is calls and one thing and another. I am preoccupied. I couldn't be positive about that.

Q. You say you prepared the instrument that you entitled "Agreement" that is marked Plaintiff's Exhibit 11 here?

A. Yes, sir.

Q. Exactly what instructions did you receive for its preparation?

A. Peter Bercut told me to prepare a cancellation of the contract.

Q. Peter Bercut told you? A. Yes.

Q. Did he tell you the parties to the agreement that he wanted [340] you to draw?

A. It wasn't necessary.

Q. Did he tell you? A. No.

(Testimony of W. G. Evans.)

Q. You have been drawing agreements for the Bercut Brothers for many years, haven't you?

A. Yes, sir.

Q. How many agreements would you say you have drawn for them?

A. A great many.

Q. A thousand?

A. Twenty years is a long time. The agreements are varied.

Q. You think it might be a thousand, Mr. Evans?

A. It would be purely guess work on my part.

Q. What would you say?

A. Well, there are so many contracts, releases, pretty nearly everything is a contract of some kind. It would be purely a guess on my part. It may not be right.

Q. Your best estimate, what would you say?

A. Are you talking about legal documents now?

Q. Agreements.

A. In the twenty years—let's see—that would be a hundred a month—a hundred a year—oh, no, not that many.

Q. How many would you say?

A. Fifty a year—not fifty a year either.

Mr. Naus: Maybe we can settle on a thousand, Mr. Bourquin.

The Witness: No, I would say maybe twelve a year, about a dozen a year.

Mr. Bourquin: Q. Maybe you have drawn

(Testimony of W. G. Evans.)

about two hundred and thirty, forty or fifty, something like that?

A. Something like that anyway.

Q. When you prepared the agreement who typed it?

A. I am not sure whether it was the girl at the Merchants or the girl at the market.

Q. Did you dictate it, or did you rough-draft it? [341]

A. No, I rough-draft everything. I am not good at dictating.

Q. You rough-drafted it? A. Yes.

Q. You gave it to the girl in rough draft to type?

A. I write them out.

Q. I beg your pardon?

A. I wrote it out.

Q. You wrote it out; that is what I meant.

A. Yes.

Q. When did you receive it from the typist?

A. I think she had it on my desk the next morning. I got down about eight-thirty.

Q. Did you look it over? A. Yes.

Q. Did you make any changes in it?

A. No.

Q. Who approved it of your employers?

A. Peter Bercut, I think.

Q. When he came in you showed it to him?

A. Yes.

Q. He read it? A. Yes.

(Testimony of W. G. Evans.)

Q. Did he ask any changes in it?

A. No, sir, he approved it.

Q. He did not make any changes in it?

A. He approved it.

Q. So the way you prepared it and received it from the typist and he read it and approved it is the way it was when Mr. Hermann signed it; is that true? A. That is right.

Q. By the way, who signed it first, Mr. Peter Bercut or Mr. Hermann?

The Court: Show him the document.

The Witness: It is my impression that Peter Bercut had signed first. Yes, that is right.

Mr. Bourquin: Q. When did he sign; can you tell us? A. That morning.

Q. When? Before the arrival of the parties or after the arrival of the parties?

A. I couldn't say.

Q. You couldn't say?

A. No, sir, I couldn't. [342]

The Court: Q. Did he sign it before Hermann signed it? A. I think he did.

Mr. Bourquin: Q. Before Mr. Hermann signed it had it been shown to Mr. Elman?

A. Yes, sir.

Q. Elman looked at it and read it?

A. Yes, sir.

Q. Gave it to Hermann and told Hermann it was perfectly all right for Hermann to sign it?

(Testimony of W. G. Evans.)

A. Yes, Mr. Hermann had a copy himself.

Q. Did you know when you prepared that agreement who Mr. Elman represented?

A. When I drew the agreement?

Q. Yes. A. Yes, sir.

Q. Who? A. Park, Benziger.

Q. Park, Benziger & Company? A. Yes.

Q. There was a note—unless I do an injustice that I do not mean—in the examination by the defendants' counsel of you, a note of, I thought, not excuse but explanation for the form of the document, that you are not a lawyer. You are not a lawyer, are you, Mr. Evans? A. No, sir.

Q. Did the Bercut Brothers have any lawyers at that time?

A. Oh, yes, I think so.

Q. They had lawyers at that time and before?

A. Before.

Q. They have had legal problems, questions that they called upon lawyers for? A. Naturally.

Q. Who were their lawyers at that time?

A. Let's see. I think they had Mr. Brownstone.

Q. A very good lawyer, is he?

Mr. Brownstone: Thank you.

Mr. Bourquin: I didn't see you here. I guess he is. A. Yes.

Q. Did you sometimes in the course of your

(Testimony of W. G. Evans.)

business or the [343] preparation of agreements call up the lawyers of Mr. Bercut?

A. Oh, yes, quite often.

Q. On this occasion you say you did not?

A. No, I didn't in this case, no.

Q. Any reason for not consulting the lawyers at this time?

A. No. It was a simple cancellation. It wasn't much to that.

Q. A simple cancellation? A. Yes.

Q. Why didn't you put Park, Benziger in there, Mr. Evans?

A. We had no contract with Park, Benziger.

Q. You did not happen to go with Mr. Jean Bercut when he procured the contract from Mr. Elman the day before, did you?

A. No, sir; I got plenty to do in Merchants Ice.

Q. Did Jean Bercut ever show you that contract? A. No.

Q. Did he ever say anything to you about it?

A. No.

Q. Did you know that the contract had been assigned to Park, Benziger?

A. Not until Mr. Elman said so that morning.

Q. Which morning?

A. The morning of the 26th.

Q. That was before you prepared the agreement which you hold in your hand, Plaintiff's Exhibit 11? A. That is right.

(Testimony of W. G. Evans.)

The Court: We will be in recess until two o'clock. The jurors will please remember the admonition I have given you heretofore. The jury may now retire.

(Thereupon a recess was taken until 2:00 p.m. this date.) [344]

Afternoon Session, Friday, March 17, 1943, 2:00 p.m.

The Court: The jurors are present. You may proceed.

Mr. Bourquin: We have no further questions of Mr. Evans.

PIERRE BERCUT

one of the defendants, called in his own behalf; sworn.

The Clerk: Q. Your name is Pierre Bercut? A. Peter Bercut, also known as Pierre Bercut.

Direct Examination

Mr. Naus: Q. And you are one of the defendants in this case? A. Yes.

Q. Mr. Bercut, there has been a reference in the testimony here to Merchants Ice & Cold Storage Company. Now, you and one or more of your brothers acquired a majority ownership in the vot-

(Testimony of Pierre Bercut.)

ing stock in that company back in January, 1941, didn't you? A. Yes.

Q. Then shortly following that you assumed the presidency of Merchants Ice and took over the management of it? A. Yes.

Q. And appointed Mr. Evans general manager of Merchants Ice at that time? A. Yes.

Q. Did you and your brother Jean first acquire this stock of wine before or after you took over that management of Merchants?

A. After.

Q. At the time you took over the management of Merchants Ice you first fired out the old management, did you? A. Yes.

Q. After taking it over did you or not have considerable idle or vacant space down at Merchants Ice?

A. Very much so. It was a place well suited for wine, but there was no wine in it.

Q. Prior to that time had you ever dealt in wine? A. No, sir. [345]

Q. Had you ever bought or sold wine before?

A. No, sir, outside of what I would use in my own family.

Q. Well, you would buy a glass or bottle for yourself? A. Yes.

Q. That is as far as it went, was it?

A. Correct.

Q. About how soon was it after you took over

(Testimony of Pierre Bercut.)

Merchants Ice that you and Jean started to acquire this stock of three hundred odd thousand bottles?

A. Within the first six months, I believe.

Q. I believe you acquired the wine in bulk or gallonage from Fruit Industries in the first place?

A. Not exactly. It was acquired that way, but it was that the Fruit Industries agreed to bottle it for us.

Q. You bought it in bulk and arranged with them and you supplied the bottles and arranged with them to bottle it and deliver it to you in bottles? A. Yes.

Q. Then you laid it down in the Merchants Ice?

A. Yes, that is the only way I knew it.

Q. After laying it down, you and your brother Jean kept it under a fairly constant or even temperature from the time you acquired it until——

A. The engineer for Merchants Ice attended to that.

Q. At the time you and Serge Hermann signed this original contract of January 29, 1943, at the time you entered into that contract did you then know that if at any time thereafter you did not deliver the wine as called for by the contract that the buyer could not acquire it elsewhere?

A. I didn't have the least idea of that.

Q. Did anybody up to and including January 29th give you notice or warning or information that if you did not deliver that wine it could not be gotten somewhere else?

(Testimony of Pierre Bercut.)

A. No. Our deal was entirely between ourselves, and it did not go outside; I didn't go out and talk about it, or anything. I just kept that part of [346] our own business.

Q. How long before the signing of the contract on January 29, 1943 had it been that you first met Mr. Serge Hermann?

A. Only a few days before, probably. It all took place during one week, I believe.

Q. Up to, roughly, somewhere about a week before signing that contract he was an entire stranger to you, was he?

A. Yes; never met him before.

Q. Up to the time you negotiated and entered into the contract with him, the one on January 29, 1943, had you ever had any business or dealings with Park, Benziger & Co.? A. No.

Q. You were mentioned as one of the persons present at the conferences of April 26th and 27th, 1943. You were present, of course, weren't you?

A. Yes.

Q. The testimony in this case indicates that the opening or beginning conference of April 26, 1943, was one in which Mr. Elman was included and Mr. Hermann was excluded. That is correct, isn't it?

A. Only for a little private questioning.

Q. In advance? A. Yes.

Q. Now, turning your attention and turning your answers to what occurred that morning in the conference before Mr. Hermann joined the confer-

(Testimony of Pierre Bercut.)

ence, tell us as best you can what was said, or the substance of what was said by those present.

A. You mean before Mr. Hermann came into the conversation?

Q. Yes.

A. I asked Mr. Elman, I believe I told him, I said, "How long do you know this man Hermann?" He said, "About six months; why?" I said, "We heard some very bad reports about the man, and I was wondering if you were aware of it." He said, "No. I only know him for six months. As far as I know he is all right." Something like that. Then I begin to tell [347] him what we heard through Jean, he made the report to me of what he had found out. Then he said, "I am very disappointed, I am very sorry it turned out to be that way." He says, "In that case I think there is only one thing to do, that is to cancel the whole thing." He said, "That is my opinion." He said, "I would be willing to do that." He says, "You know, my firm is not a wealthy firm, but they are honest, and if——" He said something in French that means that if you rub with dirt you will get dirty yourself, something, as near as I could translate it to English.

Q. Mr. Elman said that?

A. Yes; with difficulty. It was not very good French.

Q. But Mr. Elman speaks French and you speak French?

(Testimony of Pierre Bercut.)

A. I speak French, and I had told him, yes, that was the way I translated it. Then we suggested that we all go in and meet and talk over the whole thing in front of Hermann, let him know our findings.

Q. In this preliminary conference was anything said with respect to the nature of the relationship between Park-Benziger, on one side, and Serge Hermann, on the other?

A. That came up; I am not so sure that it was before or after Mr. Hermann was in the conversation.

Q. It did come up, either when Hermann was present or when he was absent? A. Yes.

Q. When it did come up what, if anything, was said at one or the other of those conferences about it?

A. Then I asked Mr. Elman what was his connection with this man.

Q. You asked Mr. Elman?

A. Yes. I said, "What is your connection?" They came together all the time, and Hermann introduced him to me as a representative of Park-Benziger with nothing, no other comment except he was going to help him to market the wine, or something of that kind, but I was not interested to find out [348] why they traveled together, that was none of my business. I sold the wine to Hermann and I felt—

(Testimony of Pierre Bercut.)

Q. I know, but was anything said as to the nature of the relationship between them?

A. No, they never told me that, but they consulted each other about what to do and what not to do.

Q. Stepping aside for a moment, before the conference of April 26th began you had met Mr. Elman the first time about how long before?

A. I believe it was almost a week.

Q. About a week before? A. Yes.

Q. Up to that time, of course, he was a stranger to you?

A. Yes. He was still a stranger, he never had any dealings with me. He and Hermann, Hermann took him—I opened the door to show him the cellars, and Hermann did all the talking. He showed him the bottles, and showed him the—— and I probably drew the conclusion that he was selling the wine to him.

Q. At the first time you met Mr. Elman, and at every time after that you ever met him, up to and including April 27th, did you ever meet him alone? A. Never.

Q. Was or was not Mr. Hermann always with him? A. Would be together all the time.

Q. On every occasion when you met them the two were together?

A. Always two.

Q. As between the two of them, who did the talking?

A. Mr. Hermann was doing the business.

(Testimony of Pierre Bercut.)

Q. Well, Mr. Hermann did the talking as between he and Mr. Elman, did he?

A. Yes, he was doing some selling to him, I am sure.

Q. Going back to the conversation on April 26th, tell us what was said, the substance of what was said by those present, from the time that Mr. Hermann was called into the room, from that time on?

A. Well, Jean Bercut went on to give the details of [349] what he had found out. Shall I recite it, just the way I heard it there?

Q. Whatever you heard.

A. Exactly the same things. I recall Jean Bercut telling, accusing Hermann of some dealings with a firm named Chateau Montelena of San Francisco, or St. Helena, and that he had practically talked him out of his wine; in fact, he did have the wine shipped to him and agreed to pay for it on arrival, and when it arrived Hermann pleaded for more time to pay, and he gave him a trade acceptance, and the trade acceptance was not honored, and finally I find out why it was that Feldheym was out of his wine, and they had some letters saying the wine was perfect, and some correspondence, some of the correspondence that Hermann had acquired—had the wine in his possession and he said it was not so good. Then he talked about another deal in Detroit, I think, where this happened, at the same time, also, that the wine was

(Testimony of Pierre Bercut.)

going on the way to New York and Mr. Feldheym had confidence with Hermann at that time, and he sent him to dispose of another lot of wine, and that he didn't make any—

Q. Account of sale?

A. Account of sale of any kind, and also Mr. Feldheym, it was his position that he had to pay the people and that the wine was taken away, and those things, to those things Mr. Hermann did not deny, but he said it was his own business, it had nothing to do with us, and I called his attention that I didn't want to get into a mix-up of that kind, and at that time I asked Mr. Elman what was his connection, and he said, "Well, we have a deal and we are going to give him 50 per cent." I said, "If you have 50 per cent and I ship some wine and somebody is going to attach that wine, I will be the one who will be the loser. I said, "I think we should go and cancel that contract if [350] you are satisfied to do so."

Q. What did he say?

A. He said it was all right with him, and Mr. Elman said he, himself, was also satisfied. The reason the cancellation came up, we had a little difficulty before about the way the wine would be put up, and they told me——

Q. State what that was, that difficulty about putting up the wine.

A. Well, they were in the cellar——

Q. Who is "they"?

(Testimony of Pierre Bercut.)

A. Hermann and Elman, and they told me that I would have to take every bottle and polish it and clean it and wash it, and then put on a big label and put it in a silk paper.

Q. Silk tissue?

A. Silk tissue. I said I didn't know whether those things were available, and besides that my contract didn't call for those packing expenses. So he said, "Well, my dear Pierre, if you are not satisfied we will cancel." So I concluded, too, that they were in that mood and they were not happy with their deal, and I was satisfied to cancel. I didn't want to do business with people who were not satisfied.

Q. As a matter of fact, did you, on one side, and Mr. Elman on the other, ever come to any agreement whatever with respect to the washing of the bottles and wrapping them in tissue paper?

A. No; that was left in suspense. That is probably then what started the whole idea of the cancellation; that gave me an idea they were not happy with their deal.

Q. Going back to the conversation of April 26th, when everybody was present, you reached a point there, and I will ask you what, if anything, was done with respect to going ahead about the cancellation?

A. Well, we talked just on those lines, that there will be on account of the showing made, the credit

(Testimony of Pierre Bercut.)

and one thing another, that it was the best for all concerned to cancel the business. [351]

Q. Was anything said with respect to having a paper written up showing the cancellation?

A. No. I think that was the procedure that is done in a case where they don't go through with the contract.

Q. When the conference of April 26th broke up was any arrangement made for meeting again?

A. Yes.

Q. What was the arrangement?

A. The arrangement was that we would have a cancellation drawn up for them and if they would please come back and sign it, and we made the time and the place and we all were there on the job.

Q. What instructions, if any, were given to Mr. Evans, who was present, with respect to drawing the cancellation?

A. The only thing I told Mr. Evans, I said, "You heard what took place. You see what they want. They want a cancellation and I want a cancellation, draw one up." Mr. Evans had more experience than I have in these matters, and I always leave it to him to use his discretion to get it up, it is satisfactory for both sides. I did not dictate any part of it, or tell him how to do it. I just told him, "You were here at the conversation, you heard what took place, draw a cancellation."

(Testimony of Pierre Bercut.)

Q. As a matter of fact, is it or not true that on many things of that nature, you left the writing of a paper like that to Mr. Evans?

A. Very much so. I would be willing to sign anything he writes, but he insists on me reading it. In other words, I would be willing to sign anything he wrote for me.

Q. In the conference on April 26th, was the word "release" used by anyone present?

A. No, sir.

Q. Were the words, "personal release" used by anyone present?

A. No, sir.

Q. Was the word "cancel" or "cancellation" used?

A. That was the [352] only word that we used.

Q. Up to the time of the first conference, or up to the time of the conference had on April 26th, had you ever been given a copy of an assignment, or had you ever been told there had been an assignment of any kind from Serge Hermann, or from Chateau Montelena of New York, or from Mrs. Hermann, to Park, Benziger & Co.? A. No.

Q. When was the first time you ever heard or were told that there had been any assignment of the original contract of January 29th?

A. In that conference when Mr. Elman said that he had an assignment, but it didn't mean anything to me, because he was not going to have any part of it, and he would return it right away, and

(Testimony of Pierre Bercut.)

he looked in his pocket to give it, and he happened not to have it. He said, "You come to my room and I will give it to you," told Jean.

Q. You mean the conference of April 26th?

A. Yes.

Q. By the way, April 26th was a Monday.

A. Yes, Monday.

Q. When did you first see any paper or assignment such, for example as this paper dated February 25, 1943, the top one of the document that is marked Plaintiff's Exhibit No. 2?

A. I believe that was on the 27th.

Q. Was it before or after the conference of April 27th had broken up? A. It was after.

Q. Who showed you the paper there?

A. Jean Bercut.

Q. Your brother? A. Yes.

Q. This paper that we hold in our hand as an exhibit? A. Yes.

The Court: Exhibit No. 2?

Mr. Naus: Exhibit 2, your Honor. Thank you very much. You may cross-examine. [353]

Cross-Examination

Mr. Bourquin: Q. Will you say, Mr. Bercut, that you never saw the contract that your brother Jean procured from Mr. Elman until the 27th?

A. That was the only time I recall seeing it.

Q. When did you see it that day?

A. I don't know whether I first saw it that day

(Testimony of Pierre Bercut.)

or the next day; I think I left right after—I left right after that meeting.

Q. Do you mean to be understood to say that when you entered the meeting on the 27th you did not know there was an assignment in writing?

A. Yes. That was after the 26th, yes; that was the 27th, I think it was in the office that day.

Q. Did you know prior to the 27th that the assignment was in writing? A. No.

Q. You didn't know that? A. No.

Q. Did you know, when you entered the meeting on the morning of the 27th that the assignment was in writing? A. No.

Q. Did not know that, either? A. No.

Q. Had you talked to your brother, Jean, at any time between the afternoon of the 26th and the opening of the meeting on the 27th?

A. No. The next time I saw Jean Bercut was at the same meeting that I saw the other people, too.

Q. You had not spoken to him? A. No.

Q. He had not called you? A. No.

Q. He hadn't said anything to you?

A. No.

Q. Now, the day before, in the afternoon, didn't you send Jean up to—tell him to go and get the contract at the hotel?

A. That was in the presence of Mr. Elman and Mr. Hermann.

Q. The day before, in the afternoon, didn't you

(Testimony of Pierre Bercut.)

tell, didn't you say to your brother, Jean, "You go on up to the hotel and get the contract"?

A. I didn't send him to the hotel to get the contract. He went with Mr. Hermann and Mr. Elman, and I told him to [354] bring the contract with him, give it to him.

Q. Well, didn't you send him——

A. I didn't send him; he does things on his own accord.

Q. Well, did you ask him to go up to the hotel and get the contract?

A. No. He was there because he was taking these people home, I guess. He went there of his own initiative.

Q. You didn't ask him to go on up with them and pick up the contract?

A. If I asked him——

The Court: No, no. Did you ask him that? Did you ask him to go up and pick up the contract? Can't you answer the question directly?

The Witness: Your Honor, I believe I did, yes.

Mr. Bourquin: Q. You believe you did. Your dealings with Park-Benziger had been entirely satisfactory all of the time, hadn't they?

A. I didn't have any dealings with Park-Benziger. We had our dealings with Park-Benziger through Hermann. I never had any——

Q. Didn't you ship commodities, wine in bottles in carload lots, to Park-Benziger?

(Testimony of Pierre Bercut.)

A. Those deals were all made by Hermann in their behalf, I believe.

Q. Didn't you correspond with Park-Benziger after that about other matters.

A. We correspond to find out when we were going to get the money, that is the only thing.

Q. You always got your money for the wine you shipped, didn't you?

A. When I shipped to Park-Benziger, yes.

Q. You always shipped sight draft bill of lading, too, didn't you? A. Yes, we do.

Q. When you testified about this question of Mr. Hermann's integrity being raised by you or your brother on the 26th, you had no objection to Park-Benziger, had you?

A. We were dealing with [355] Hermann.

Q. Please answer the question. A. No.

Q. You had at no time any objection to them?

A. Objection to the customer of Hermann——

The Court: Read the question.

(Question read.)

The Witness: A. No.

Mr. Bourquin: Q. Had you ever, until the 26th of April, had any reason to believe that Park-Benziger could not perform the contract?

A. I didn't say——

The Court: Answer the question. Read the question.

(Question read.)

A. They had a contract——

(Testimony of Pierre Bercut.)

The Court: No. Answer the question, "Yes" or "No."

The Witness: A. No.

The Court: If you wish to explain it you may.

A. My answer is that I didn't know that I had any business with Park-Benziger except as a customer of Hermann.

Mr. Bourquin: This correspondence that has been introduced in evidence bearing your signature, you signed that, yourself, did you? A. Yes.

The Court: What do you mean "this correspondence"? Identify it.

Mr. Bourquin: All right, your Honor. [356]

Q. I refer you here to Plaintiff's Exhibit 5 under date of February 26 of Park, Benziger. You signed that yourself, Mr. Bercut, didn't you? Will you look at it, please.

The Court: Look at your signature.

A. Yes, sir, I signed this.

The Court: Q. You signed it?

A. Yes, I signed it.

Mr. Bourquin: Q. You dictated it?

A. No, sir.

Q. Was it prepared at your direction?

A. No, sir—well, the only instruction is to answer the letter; that is all.

The Court: Q. Who wrote it?

A. Mr. Evans.

Mr. Bourquin: Q. Did he write it at your direction?

(Testimony of Pierre Bercut.)

A. Yes, he wrote the letter at my direction but not my dictation.

Q. Do you want to say that you signed it with or without reading it?

A. I hope I read it.

Q. What? A. I hope I read it.

Q. Well, did you? You would know from your business practice.

A. I sign many letters sometimes without reading them. But I am not trying to get out of this. I must have read it.

Q. In the answer that you filed in this action, the answer to the complaint, is the allegation as a defense to the action on the contract that the Park, Benziger Company was unable to perform the contract, that they were not financially capable. You know that, don't you?

Mr. Naus: One moment. Objected to as not proper cross-examination.

Mr. Bourquin: Who verified the answer? I would like to see that, please.

Mr. Naus: I am submitting the objection. It is not proper cross-examination. It was not touched on in the direct. It is not even proper rebuttal. [357]

Mr. Bourquin: He is a party, your Honor.

The Court: I know he is. I am thinking about that.

Mr. Bourquin: All right.

(Testimony of Pierre Bercut.)

The Court: Overruled.

Mr. Bourquin: Q. You set that up as a defense to this action, didn't you, Mr. Bercut?

A. Yes, sir—my attorney did.

Q. What information did you have at the time you verified or signed the answer or filed it upon which to predicate that allegation in this court?

Mr. Naus: One moment, please. May I see the original answer, Mr. Mitchell?

The Court: I suppose the file is in chambers. Have you a copy there?

Mr. Naus: I just wanted to verify what Mr. Brownstone has told me and I understand to be the fact.

The Court: Ask my secretary for the original papers in this suit.

Mr. Naus: I believe there is a wrong assumption in the question.

The Court: I think it would be proper whether he signed it or not.

Mr. Naus: I am simply trying to point out under the new Federal Rules an answer only needs the signature of counsel, and I do not think the answer shows his signature or shows he ever read it. That is the only thing I want to establish, to let him see it first so he won't be mistaken in thinking that he did sign it, that he did read it, that he did swear to it.

The Court: I think you are right, Mr. Naus. Let us have the pleading. We will have a recess for five minutes.

(Testimony of Pierre Bercut.)

(Recess.) [358]

Mr. Naus: Here we are, Mr. Bourquin. It was as I thought. Under the new rules the answer is signed only by counsel and not signed or sworn to by the defendant.

Mr. Bourquin: Well, I guess because of those land cases I continually find myself operating under the old rules, since they are excepted. I would like to withdraw the question and reframe it, then.

Mr. Naus: Under the new Federal Rules some cases come under them and some do not. It is difficult for any trial lawyer to know when a case does and when it does not, and that is why I wanted to look at it.

The Court: Yes.

Mr. Bourquin: Q. Mr. Bercut, in the answer filed by the defendants Peter Bercut and Jean Bercut, doing business as P. & J. Cellars Company, a co-partnership, it is alleged as a fourth separate defense that the plaintiff never had and has not now the ability to perform the terms and provisions and conditions of the agreement marked as Exhibit A, as modified by Exhibit B, required to be performed therein by Chateau Montelena of New York, that referring to the contract and the supplemental agreement attached to it. What information did you have at the time the answer was filed on August 12, 1943 to support that allegation?

Mr. Naus: That is objected to as immaterial.

The Court: Overruled.

(Testimony of Pierre Bercut.)

Q. Did you know anything about it at all?

A. No; I gave the case to my attorney, and it was up to him to answer according to his method. In other words, I didn't tell my attorney what to do.

Mr. Bourquin: Q. I know your attorneys, and I know that [359] they did not file an answer on your behalf without getting full information from you, did they? A. I gave them the facts.

The Court: Direct your questions to the matter you have in mind specifically.

Mr. Bourquin: Q. Did you give your attorneys any information upon the question of the capacity of Park, Benziger to perform the contract in suit here prior to the filing of this answer?

A. I don't believe so.

Q. You did not have any information to question the capacity of Park, Benziger to perform the contract, did you? A. No.

Q. When the answer was filed you were as satisfied then as you were on April 26 that Park, Benziger was capable of performing the contract and was reliable to do business with, did you not?

A. I didn't have any contract with Park, Benziger.

Q. When the answer was filed you were as satisfied then as you were on April 26 that Park, Benziger was capable of performing purchase terms of the contract in suit, were you not?

(Testimony of Pierre Bercut.)

A. I wasn't referring to the contract in suit. I must have been satisfied; we offered to sell them wine.

The Court: Read the question. Listen to the question. If you don't understand it, say so.

(Question read.)

A. I don't know.

The Court: Q. What? You don't know?

A. I don't know yet.

Mr. Bourquin: Q. Let me refer you to that subject as you testified on your deposition on September 2, 1943 following the filing of the answer. Page 12, counsel—and if you agree, I will state it to the witness.

Mr. Naus: You may read it. [360]

Mr. Bourquin: I will read these questions and answers, Mr. Bercut:

> "Q. Now, I will ask you the same question with regard to Park, Benziger. When did you ascertain that Park, Benziger did not have the ability to perform the agreement?
>
> A. I never found out they couldn't perform. I never understood that I did business with Park, Benziger.
>
> Q. Well, do you know whether or not they had the ability to perform?
>
> A. I didn't look them up We looked up Hermann.
>
> Q. Let me ask you this question: Do you

(Testimony of Pierre Bercut.)

know whether Park, Benziger had the ability to perform the agreement?

A. I didn't look them up. I didn't have any business with them.

Q. Would you answer my question yes or no, and then you can explain.

A. All right. I don't know.

Q. Do you know whether Park, Benziger & Company had the ability to perform the agreement? A. I don't know."

Q. Was that your testimony?

A. Yes, and still is.

Q. And still is, is it? A. Yes.

Q. Now, then, the only objection you had to keeping or performing the contract in suit here was related to your objection to Mr. Hermann, wasn't it?

The Court: Would you read that question.

(Question read.)

A. Yes.

Mr. Bourquin: Q. You did not know of any reason to object to Park, Benziger to do business with at that time, did you?

A. I didn't object to them. I had no reason to object to them.

Q. You were not seeking to avoid business relations with Park, [361] Benziger when you consulted Mr. Elman with respect to Mr. Hermann on the 26th, were you?

(Testimony of Pierre Bercut.)

A. No; the proof is that I offered to sell him all the wine he wanted.

Q. You were not seeking a cancellation or a release of obligations to or a contract with Park, Benziger in your conference of April 26, were you?

A. I didn't have any contract with Park, Benziger.

Q. Will you answer the question: Were you that day seeking to obtain a cancellation or a release from any obligations to Park, Benziger?

The Court: Read the question. You may answer directly, and if you have any explanation, you may make it.

A. I will answer that if I may explain.

The Court: Read the question.

(Question read.)

A. I could say no.

Mr. Bourquin: Q. When you directed the preparation of the agreement here numbered Plaintiff's Exhibit 11—I call your attention to it, Mr. Bercut—— A. Yes, I know it.

Q. ——you were not seeking to cancel or annul any business engaged in with Park, Benziger, were you?

A. No, for the simple reason I didn't have any business with them or contract.

Q. It was not your intention in directing the preparation of this nor in the presentation of the same to Mr. Hermann for signature to cancel or

(Testimony of Pierre Bercut.)

annul any business engagement with Park, Benziger, was it?

A. My understandings——I didn't have any with them.

Q. Will you answer, please? Was it?

A. To cancel with Park, Benziger?

Q. Was it your intention when you caused this instrument, [362] Plaintiff's Exhibit 11, to be prepared and presented it to Hermann for signature, to cancel or annul any business engagement with Park, Benziger? A. No.

Q. No. A. Can I explain?

Q. If you like.

A. I didn't have any business with Park, Benziger. I would have to cancel with the whole world, Park, Benziger was, so far as I knew, only a customer to Hermann.

Q. This agreement was not prepared or submitted with any intention of canceling or annulling any business engagement with Park, Benziger, was it?

A. It was canceling any agreement that I had with Hermann or anybody connected with it.

Q. Let us make that clear. Was it your intention to cancel or annul any agreement or engagement which bound you to Park, Benziger and Park, Benziger to you?

Mr. Naus: If the Court please, objected to as repeatedly asked and answered.

(Testimony of Pierre Bercut.)

The Court: I think it has been answered, counsel. I will sustain it on that ground.

Mr. Bourquin: All right, your Honor.

Q. Mr. Bercut, you sent samples of the wine covered by the contract in suit to Park, Benziger in New York, didn't you?

A. Under the direction of Mr. Hermann.

Q. Hermann? A. Hermann, yes.

Q. You sent a case of each wine specified in the contract to Park, Benziger in New York at the instance of Mr. Hermann, didn't you?

A. Correct.

Q. When Mr. Elman came to San Francisco you knew him to be the representative of Park, Benziger, didn't you? A. Yes, sir.

Q. You sat with him in more than one conference pertaining to the execution of the contract in suit prior to April 26, didn't [363] you?

A. With them, not with him.

Q. Well, with Mr. Elman and with others?

A. With Mr. Elman and Mr. Hermann always present.

Q. For example, in the course of one such conference, when a question came up as to the form of the labels to go upon the bottles, and a label concern was called up to answer an inquiry, your brother Jean in your presence making the call turned the call over to Mr. Elman, didn't he?

A. I am sorry.

The Court: Read the question.

(Testimony of Pierre Bercut.)

(Question read.)

A. He may. I wouldn't recall that.

Mr. Bourquin: Q. Let me read your testimony from the former trial on the subject to relieve it from any doubt.

Mr. Naus: The testimony on the deposition, Mr. Bourquin, or at the former trial, or whatever it was, was not on a label but on the subject matter of labeling.

Mr. Bourquin: Let me read the question and answer on page 32. You may be right, Mr. Naus. The record will settle it. I am reading the question and answer on page 32 of the transcript of the earlier trial.

> "Q. Did you call Mr. Harshman of Fruit Industries regarding the question of proper labels and tax on the wine and turn the telephone over to Mr. Elman to talk to him about that?
>
> A. No; I remember that it was my brother, Jean Bercut.
>
> Q. Did he call Mr. Harshman at Fruit Industries and turn the telephone over to Mr. Elman to talk?
>
> A. I believe so."

Q. Do you recall that testimony? A. Yes.

Q. That was correct, wasn't it?

A. Yes. If I testified to [364] it, it was correct.

(Testimony of Pierre Bercut.)

Q. And as a matter of fact, when you signed the agreement on January 29 with Mr. Hermann you knew then that you would probably or might be doing business on this contract with Park, Benziger, didn't you?

A. No, it didn't impress me that way.

Q. You may refer to your testimony on that subject.

Counsel, if I have the note right, it is page—

Mr. Naus: I am not sure the witness had finished his answer.

The Witness: May I explain something, your Honor?

The Court: Yes.

The Witness: The question of the label didn't impress me a bit, because we have a large canning business and we have labels from every wholesaler in the country, practically. We have two ways of selling merchandise. One is with the buyer's label and one is with the manufacturer's label, so we have at Sacramento S & W, Haas Bros., Liggett, and so on——their, what do you call it, labels. So if somebody was going to label our wines with another label, that didn't impress me a bit. I didn't know what they were doing.

Mr. Bourquin: Q. Well, as I understand this subject matter, you and your brother Jean acted together in it, didn't you?

A. Yes; left most of it to Jean.

(Testimony of Pierre Bercut.)

Q. You did some, he did some, and it was mutually satisfactory; you were partners; is that correct? A. Yes.

Q. You knew what he did bound you, and he knew what you did bound him? A. Correct.

Q. On this subject that I asked you before I will call your attention to what was said—on page 9, Mr. Naus—on the [365] earlier trial.

"Q. At the time this contract was executed on January 29, 1943 did Mr. Hermann mention to you the name of Park, Benziger & Company?

A. Yes, I think he did—not to me, but he mentioned it to Mr. Evans. I correct that.

Q. Was that in your presence?

A. Yes."

You did so testify, did you? A. Yes.

Q. Was that correct? A. Yes.

Q. And continuing:

"Q. Will you give us, please, the place and who was present and the approximate time?

A. When we agreed to the terms, prices and delivery, and the main subject of the contract, we decided to get something in writing, and then I asked my—what do you call him—bookkeeper, if you want to, for that purpose—to draw a contract to cover the terms that we had in mind, and the first question that Mr. Evans asked Mr. Hermann was, 'Who do you want

(Testimony of Pierre Bercut.)

the contract to, the name of the firm?' and Mr. Hermann said — he hesitated — and he said, 'Chateau Montelena.' He said, 'Maybe the best thing'——he said, 'Never mind. Make it to Chateau Montelena.' I remember that took place, or something like that, as much as my memory."

Is that correct? A. Yes.

Q. Did that happen as I read it?

A. Yes, sir.

Q. (continuing reading):

"Q. He said Chateau Montelena of New York, or Park, Benziger, is that it?

A. Well, that is the way I recollect it, but they amount to the same, I should say."

This question is by the Court: [366]

"Q. Was the name Park, Benziger mentioned?

A. It was mentioned, yes, your Honor."

You gave that testimony? A. Yes, sir.

Q. That was correct, wasn't it, Mr. Bercut?

A. Yes.

Q. He did answer, didn't he, Mr. Reporter?

A. Yes.

Q. You stated here today that there was a question arose concerning the packing or casing or preparation of wine subject to the contract——

Mr. Naus: Bottling, washing and racking.

Mr. Bourquin: Q. (continuing)——about which

(Testimony of Pierre Bercut.)

you said that Mr. Elman did not seem to be very happy.

A. That is right.

Q. Will you tell me if you have ever voiced or made that statement before in this trial on deposition? A. In this trial?

Q. Or the last trial or on the deposition.

A. Yes, that was brought up some way or other.

Q. You think it was? When?

A. Either in the examination or deposition.

Q. How shall we understand your position? Is it that the cancellation here that you allege was prepared because Mr. Elman wanted it or because you wanted it?

Mr. Naus: Objected to as argumentative in the sense that it assumes the two things were mutually exclusive, when it might have been because of both.

The Court: Sustained.

Mr. Bourquin: Q. You said before that the written assignment attached to Plaintiff's Exhibit 2, being the Elman contract, never came under your observation until after Hermann had signed the agreement, Plaintiff's Exhibit 11, that I exhibited to you before?

A. Well, I must say that I am [367] not clear. It was between the two days. I can't honestly say it was that day—the first day or the second day—but I saw it.

Q. Did you see it before you presented to Mr.

(Testimony of Pierre Bercut.)

Hermann the Plaintiff's Exhibit 11, that agreement, to sign?

The Court: The cancellation agreement.

Mr. Bourquin: Yes.

A. I couldn't say that either.

Q. You couldn't say. Have you any other reason to offer why the name of Park, Benziger was not contained in that agreement than that?

A. The only reason, in my way of doing business, if you have a cancellation of a contract, you have it with the person you do business with. I had no other agreement with anybody else, so I could ask any other wine man to cancel with Hermann. The only man I did business with was Hermann. The only man I held responsible on that deal was Hermann.

Q. You said on direct examination that you took Mr. Elman to see the wines, but you said when you did get him there Mr. Hermann did all the showing to him; is that true?

A. Yes, sir.

Q. Will you explain to us why it was when you came to register an objection to Mr. Hermann on the 26th that you took that up with Mr. Elman and not Mr. Hermann?

A. Well, I didn't want to offend him. I wanted to know what his relation was, and we had been very friendly up to that time, and I didn't have

(Testimony of Pierre Bercut.)

any reason why I should not be polite about it. They were traveling together. It is just like I am going to say something about your friend. I would rather talk to you personally before, seeing how you feel about it. That is the reason why I wanted to know how he felt about my making those remarks.

Q. Did you receive a telephone call from Mr. Breslauer on [368] April 28 asking you for the return of Mr. Elman's contract?

A. Yes—I wouldn't know whether it was the 28th, but I received a call from Mr. Breslauer.

Q. Well, how would you relate the time with respect to the other events that you do remember the date of?

Mr. Naus: Mr. Bourquin, I would suggest this: Mr. Breslauer has said it was the 28th. I know he is a gentleman, a truthful man, and I will accept that and assume that the 28th was the date of the telephone call. I shall not challenge his statement.

Mr. Bourquin: Q. What did you tell Mr. Breslauer when he asked you for that contract?

A. I told him I didn't have it.

Q. Was he satisfied with that, or did he ask you more?

A. Then he said, "Who's got it?"

And I said, "My brother Jean, I suppose. I don't know anything about it. Call him up."

(Testimony of Pierre Bercut.)

Q. Where were you when you received that telephone call?

A. I wouldn't know. I may have been on Market Street, or it may have been in the office of the Merchants. When I came in the operators told me—

Mr. Naus: If the Court please, wasn't the answer complete when he said, "I wouldn't know" instead of conjecturing?

The Court: Yes.

Q. You do not know where you were when you got the message? A. No.

Mr. Bourquin: Q. You said you did not have it, your brother Jean had it, call him up?

A. I didn't say that.

Mr. Naus: He didn't say that, Mr. Bourquin. He said maybe Jean had it; he didn't know. [369]

Mr. Bourquin: Well, may I have it read back?

Mr. Naus: No objection.

The Court: Read it.

(Record read as follows: "A. Then he said, 'Who's got it?' And I said, 'My brother Jean, I suppose. I don't know anything about it. Call him up.' ")

Mr. Bourquin: Q. You told him you did not know anything about it, is that correct?

A. No, I said I didn't have it.

Q. Did you tell him you didn't know anything about it?

A. I don't think so.

(Testimony of Pierre Bercut.)

Q. Did you tell him to call up Jean?

A. Yes.

Q. Did you communicate with your brother Jean about Mr. Breslauer's call?

A. I had no way of seeing Jean about it. The next time I saw him I probably told him.

Q. Probably? A. Yes.

Q. Did your brother Jean consult you or did you consult Jean after the formal demand for the return of the instrument was served upon him?

A. Yes—he consulted me.

Q. Did you receive any further telephone calls from Mr. Breslauer asking you to speak to him about the matter after that?

A. I wouldn't remember.

Q. Did you ever make any remark to Mr. Breslauer, or did Jean, to your knowledge, of his own inquiry, request for the return of the contract?

A. I wouldn't know.

Q. Who did you say it was, Mr. Bercut, that offered to cancel this contract?

The Court: Make it more specific. Who did you say offered when?

Mr. Bourquin: Q. At the meeting of the 26th, who did you say it was that offered or suggested to cancel the contract? [370]

A. I think Mr. Elman was the first one.

Q. Mr. who?

A. Elman. He said he didn't want any part of it.

(Testimony of Pierre Bercut.)

Q. Was the first one to suggest that Mr. Elman?

A. Either one of the two. I am satisfied it came from them first.

Q. Well, it may be important. Can you tell us which one it was? A. No.

Q. Let me ask you this. I am referring to his testimony on the last trial, Mr. Naus, page 46, please, line 14. A question by the Court:

"Q. Who suggested cancellation first?

A. Mr. Hermann told me about three times that he would cancel it, not to—anything that I didn't want to comply with right away, he proposed to cancel.

Q. Who first said 'cancel'?

A. Mr. Hermann, he said, 'You can have my contract any time you want it.'

Mr. Breslauer: Q. Did you say Mr.—

A. Hermann.

Q. Hermann—Mr. Hermann?

A. Mr. Hermann, yes."

Was that your testimony?

A. Wasn't that the question on the 27th? He didn't say three times on that conversation that day.

Q. Did you so testify at the earlier trial?

A. This that you are reading about came up on a different occasion, not on the 27th—or on the 26th.

Q. Let us get that. Did it transpire as I read it?

(Testimony of Pierre Bercut.)

A. Not on the same day. Those things happened on different occasions that I mentioned in that testimony.

Q. I will have to read that to you again to complete our record. Question by the Court: "Who suggested cancellation first?"—— [371]

Mr. Naus: If the Court please, it has been read once. Is it necessary to read it twice?

The Court: I don't think so, not if the witness understands it.

Mr. Bourquin: Because I passed it without getting a direct answer, your Honor.

The Court: The only thing the witness said was that did not come up on the date that you said it did. It came up, he said, on a later date, and I think he used the word "27th."

Mr. Naus: I will say this, if the Court please: As to any testimony read by counsel, from either the former trial or from the deposition, I will stipulate that that testimony was in fact given on that occasion in the form read without any need of calling any reporter, notary, or anybody else, if that meets it.

The Court: What date is that?

Mr. Bourquin: We will have to go to the context, I am frank to say, to get it.

The Court: It may take too long to get that.

Q. You have no recollection that that was said on the 26th?

A. When we were talking about three times,

(Testimony of Pierre Bercut.)

that wasn't that day; that was a different occasion. For instance, the time he suggested I should wash the bottles, he mentioned that he was willing to cancel.

Q. Who said that?

A. Mr. Hermann said he was willing to cancel the contract, that he didn't want to go to the work that he asked me to do. And in some other conversation. I remember about three times he told me, "Any time you aren't satisfied, we'll just call it off." That is what he told me three straight times. [372]

Q. The question of Mr. Bourquin was whether or not you gave the testimony he read to you.

A. I testified that on the 27th I don't know who first spoke about cancellation.

Mr. Bourquin: Q. When was it that Mr. Elman first told you that Mr. Hermann would receive fifty per cent of the net profits from the sale of the wine?

A. I think it was on the 26th when I asked him what was the set-up between them. I said, "What is your connection? What is your relation, the two of you here, in regard to that deal? What is your connection with Elman?"

I asked Elman what was his connection with Hermann, how he was here, what he was here doing.

Q. All right. Let me pick this transcript up again on this subject, and I will refer to your state-

(Testimony of Pierre Bercut.)

ment as follows—I will commence with this: The Court said to you, "Letterheads?"

"A. Letterheads, to one another; but I knew that Hermann wasn't going to drink the wine; I knew it was going to be sold to somebody; I didn't know whether they were selling or getting together, I never asked him except the day that we canceled, what was his connection with it, how he intended to handle it. He told me that he intended to give half of the profit to Hermann.

I said, 'That makes him a partner, and for that reason I can't deal with Hermann on that wine.' And they suggested to cancel, oh, three times."

What day was that?

A. That was the same answer that I give now, but it wasn't probably——maybe it came that way; I don't know.

Q. What was the day that you first learned that Mr. Hermann was going to participate in 50 per cent of the net profits from the sale of the wine?

A. It was that day. [373]

Q. What day? A. On the 26th.

Q. On the 26th. Now, then, let me go immediately from that to the next question by the court:

"Q. Who suggested cancellation first?

A. Mr. Hermann told me about three times that he would cancel it, not to——anything

(Testimony of Pierre Bercut.)

that I didn't want to comply with right away, he proposed to cancel.

Q. Who first said, 'cancel'?

A. Mr. Hermann, he said, 'You can have my contract any time you want it.'

Mr. Breslauer: Q. Did you say Mr.——

A. Hermann.

Q. Hermann—Mr. Hermann?

A. Mr. Hermann, yes."

Q. Is that correct? A. That is right.

Q. Then was it Mr. Hermann who first suggested the subject of cancellation?

A. Is that what it says there? Correct.

Q. Going back for a minute, in answer to a question you said to his Honor Mr. Elman suggested cancellation when some disagreement arose about washing the bottles, is that right? A. Yes.

Q. What day was that?

A. That was during the previous week or so. I think they were down in the cellar occasionally once a day, and once during one of their visits.

Q. Was that prior to the 26th?

A. Oh, yes.

Q. That was prior to the objection you voiced about Mr. Hermann? A. Yes.

Q. And you say prior to that 26th Mr. Elman himself had suggested cancellation because of the difficulty on this agreement about washing the bottles? A. Yes.

Q. You are sure about that?

(Testimony of Pierre Bercut.)

A. Yes—Mr. Elman or Mr. Hermann?

Q. Mr. Elman, A. No, Hermann.

Q. Just this last question, Mr. Bercut, please: In the meeting [374] of April 26th was there a difference over whether or not the contract was assignable? A. Yes.

Q. Who brought that up?

A. I believe I did.

Q. You did. Tell us what you said.

A. I said, "I observe an assignment." I said, "What is the——" no——something was said about ——Mr. Elman said he was out something. He says, "I am out some costs on that thing."

I said, "That is all right, why are you out?"

He said, "We had an assigment."

I said, "What do you mean, an assignment? This contract was not assignable."

He said, "It doesn't say it wasn't," and it remained that way.

Q. Didn't everybody get hold of the contract and begin running through it to see whether it was assignable or was not assignable?

A. It was a question put to us because it didn't say it should be or didn't say it wasn't.

Q. Was your copy of the contract produced and examined by all present to see whether it contained any provision against an assignment?

A. Yes.

Q. Just as Mr. Evans testified today?

A. Yes.

Mr. Bourquin: I think that is all.

(Testimony of Pierre Bercut.)

Mr. Naus: You may step down. The defense rests, your Honor.

Mr. Bourquin: I would like at this point, if your Honor will permit, to recall Mr. Jean Bercut for one question on recross-examination that I omitted this morning, or overlooked.

JEAN BERCUT,

recalled for further recross-examination.

Mr. Bourquin: Q. Mr. Bercut, this morning I asked you what concern it was that the Henri Behar represented that I [375] mentioned, and you said Vintage Wines, didn't you?

A. That is right.

Q. I omitted to ask you, and I want to ask you now, did you, following April 27th, sell the wine the subject of this contract in quantity to Vintage Wines at prices in excess of the contract price?

A. Yes, sir.

Mr. Naus: One moment please. The same objection heretofore made to all questions with respect to the sale of this wine subsequent to April 27th.

The Court: The answer may go out. Sustained.

Mr. Bourquin: Your Honor, I understand; I was merely connecting up the examination this morning. When I had examined the witness on that question—

(Testimony of Pierre Bercut.)

The Court: I was wondering why you recalled him when I heard the question.

Mr. Bourquin: It was called to my attention this morning that I had not covered the connection between Behar and the Vintage Wines, as to whether they had any connection with the subject-matter of the contract.

The Court: I do not see how they have. They haven't any connection.

Mr. Bourquin: It was on the subject as I said this morning, of motive and reason here.

The Court: Let the ruling stand.

Mr. Bourquin: That is all, your Honor.

May I consult with my associates?

The Court: Yes.

Mr. Naus: The defendants rests.

Mr. Bourquin: The plaintiff rests, your Honor. [376]

Mr. Naus: At this time, if the Court please, there are certain matters I presume should be taken up under Rule 50 out of the presence of the jury.

The Court: Yes. Before this is done I wish to know from both sides whether there is any further testimony to be offered by either side. The reason I ask you that is that I wish you to be definite about it, because when the hour of adjournment arrives it will depend on when I will continue the case to. Are you through with the testimony?

Mr. Naus: I am.

Mr. Bourquin: Plaintiff is, your Honor.

The Court: Both sides?

Mr. Naus: Yes.

The Court: No question about it?

Mr. Bourquin: No question about it.

The Court: Would you like to take these matters up on Monday, or would you like to take them up to-day? When I say "these matters," I mean any motion you may have to make, or any discussion regarding any motion.

Mr. Naus: I don't think that at this hour of 3:20 we could possibly conclude today, anyway, and it would be more connected rather than disconnected if we took them up Monday.

The Court: I was wondering if we could not devote Monday to that.

Mr. Naus: I think it may be done intelligibly that way.

The Court: Yes. Say at 10:00 o'clock.

Mr. Naus: Yes.

The Court: I will excuse the jury now until Tuesday morning, if agreeable.

Mr. Naus: Otherwise we will have the jury here waiting for [377] half a day for that purpose.

The Court: I understand there will be no request for any reopening of the case. That is settled, isn't it?

Mr. Naus: Yes, your Honor.

Mr. Bourquin: Yes.

The Court: How much time will you wish for

argument, gentlemen? The arguments will begin Tuesday morning?

Mr. Bourquin: I would suggest about an hour and a half to open and close would satisfy the plaintiff.

The Court: Two hours on each side.

Mr. Bourquin: Plenty.

The Court: Is that plenty?

Mr. Naus: Yes.

The Court: Ladies and Gentlemen, I admonish you you are not to discuss this case among yourselves or with any persons, and you are not to form or express an opinion on the case until it is submitted to you for your verdict. We will excuse you now until Tuesday morning, March 21st. Is that correct, Clerk?

The Clerk: Yes, your Honor.

The Court: Tuesday morning, March 21st, at 10:00 o'clock. Please return to this court and be in your seats at 10:00 o'clock Monday morning, March 21st. You may now retire.

(The trial was then continued until Monday, March 20, 1944, at 10:00 o'clock a.m.)

[Endorsed]: Filed Mar. 24, 1944. [378]

[Title of District Court and Cause.]

MOTIONS

Under Rules 50(b) and 59, FRCP.

The defendants Pierre Bercut and Jean Bercut move the Court as follows:

1. To order the verdict of March 22, 1944, and any judgment thereon, set aside and to enter judgment in accordance with the motion for a directed verdict made by these defendants at the close of all the evidence, upon each and all of the grounds specifically stated in support of such motion for a directed verdict when it was made. [379]

2. To grant a new trial on all of the issues, upon each and all of the grounds stated in support of the motion for a directed verdict, and upon the following additional grounds:

a. The Court erred in refusing to instruct the jury in accordance with Defense Requests Nos. 15, 16, 32, 33, 34 and 37, on the grounds stated in the exceptions taken in due time at the trial to the refusal of the Court to grant those requests.

b. The Court erred in modifying Defense Request No. 35 for an instruction by striking out the last sentence of the Request, as excepted to at the time of settlement of the instructions.

c. The Court erred in not instructing the jury that the maximum OPA markup was, and is, 25%, in response to the inquiry received by

the Court from the jury during their deliberations.

d. The damages awarded by the jury are excessive, in that the evidence did not, and does not, warrant or justify or support a verdict in any amount greater than $29,432.85, if Hermann's 50% is not deducted, nor any amount greater than $14,686.43 if his 50% is deducted.

WHEREFORE, defendants pray that their foregoing motions be acted upon by the Court in accordance with the procedure laid down in *Montgomery Ward & Co. v. Duncan,* 311 U.S. 243.

Signed:

GEO. M. NAUS

LOUIS H. BROWNSTONE

Attorneys for defendants Pierre Bercut and Jean Bercut

Address: 706 Alexander Bldg.
San Francisco

To M. MITCHELL BOURQUIN,
ALFRED F. BRESLAUER,
GEORGE G. OLSHAUSEN,
THELMA HERZIG,
111 Sutter Street, Suite 1333,
Attorneys for plaintiff

Take notice that the undersigned will bring the above [380] motions on for hearing before the above-entitled court on the 1st day of April, 1944, at ten

o'clock in the forenoon of that day or as soon thereafter as counsel can be heard.

Signed

GEO. M. NAUS
LOUIS H. BROWNSTONE
Attorneys for defendants Pierre Bercut and Jean Bercut
Address: 706 Alexander Bldg.
San Francisco

(Acknowledgment of Receipt of Copy)

[Endorsed]: Filed Mar. 27, 1944. [381]

Monday, March 20, 1944

The Court: Park, Benziger & Co. v. Bercut, et al.

Mr. Naus: Shall I proceed, your Honor?

The Court: Yes, Mr. Naus.

Mr. Naus: At this time, if the Court please, pursuant to leave granted at the last adjournment to postpone to the present time the making of any motions, the defendants Bercut at this time, and at the conclusion of the whole of the evidence, move the Court to direct the jury to return a verdict in their favor upon the following grounds:

1. That the evidence shows that the contract was terminated by abandonment or cancellation on April 26th and 27th, 1943.

2. That the evidence shows that there was a joint venture between Serge Hermann and the plaintiff,

and that they acquiesced with the defendants Bercut in cancelling or abandoning the contract on April 26th and 27th, 1943.

3. That the evidence shows that Serge Hermann was a member of a joint venture and that he bound the venturers by his act in signing the writing in evidence here as an exhibit, the writing of April 27, 1943.

4. That the evidence shows that plaintiff, Park, Benziger & Co., was a member of a joint venture, a joint commercial venture, and that in that joint venture it was represented as to the joint venture by its vice-president, Mr. Elman, who acquiesced in the termination by cancellation of the agreement on April 26th and 27th, 1943.

5. That Louise Hermann, doing business as Chateau Montelena of New York, was, as one of the original contracting parties, bound [384] to maintain an ability to perform the contract, but eventually allowed her liquor license to terminate on February 28th, 1943, without renewal, and therefore disabled herself from performing from March 1, 1943 onward.

6. That the burden is on the plaintiff to show its own ability to perform, which ability has not been shown. In fact, the evidence shows that it would have had to finance the purchase of the wines under this contract with the Bercuts beyond the plaintiff's own means or assets.

7. That the plaintiff's claim is for loss of profits, but the evidence fails to show that when the con-

tract was entered into on January 29, 1943, and as modified on February 3, 1943, that either or both of the defendants Bercut knew that the goods were not obtainable elsewhere or would not be obtainable elsewhere in the event of non-delivery by the defendants.

8. Upon the ground that the evidence in the case of loss of profit, such evidence as there is or to the extent that it could be said to be evidence, does not prove or show with reasonable certainty that the plaintiff suffered loss of anticipated profits, because the evidence shows that the plaintiff was launching a new enterprise with respect to the wine in suit, and the profits, if any, therefrom are left to guesswork, surmise, conjecture.

9. Upon the ground that lost profits have not been proved with reasonable certainty because the evidence shows that plaintiff had, during the year 1942, handled in various lots an aggregate of eight or nine thousand cases of California wines, but has made no showing of its loss of profits expected upon that wine, but on the contrary, instead of turning to better evidence has used worse or poor evidence by way of opinion or estimate or guesswork. [385]

10. Upon the ground that lost profits have not been proved with reasonable certainty because the evidence shows that concurrently with the contract of January 29th, as modified on February 3, 1943, the parties to that contract and to the assignment thereunder have concurrently or contemporaneously dealt in other California wines outside the contract

to the extent of two carloads ordered under the letter of February 15, 1943, signed "Serge", and addressed to the defendants; to the extent of a subsequent carload ordered on April 27, 1943, on the morning of the signing of the cancellation agreement, and to the extent of further wines discussed on the afternoon, or during the day, rather, of April 27, 1943, at the office of the Bercuts on Market street, above the Grant Market, and to the extent of some wine ordered by the plaintiff from the defendants and shipped to the plaintiff from the defendants even since this suit was commenced.

The Court: Is that the wine which has been mentioned as the Chianti wine?

Mr. Naus: Exactly.

The Court: How many carloads were there of that in all?

(Discussion.)

Mr. Naus: Mr. Brownstone suggests, if your Honor has no objection, that I might restate the ground we have just been discussing in one connected form, so there may be no disagreement between counsel as to just what it covers, if your Honor will permit.

The Court: Yes.

Mr. Naus: 10. That lost profits have not been proved with reasonable certainty, because the evidence shows that concurrently and contemporaneously with the transaction covered by the contract of January 29, modified February 3, 1943, the parties [386] in this litigation dealt in California wines

of the Chianti type, or in Chianti type bottles, the wines being purchased by the plaintiff from the defendants to the extent of 3250 cases under the written order of February 15, 1943, followed to the extent of at least one carload, the evidence in other respects showing a carload is somewhere in the neighborhood of 1500 cases, ordered on April 27, 1943, and to the extent of an unspecified amount, apparently approximately a carload, at least a carload ordered by the plaintiff from the defendant during the pendency of this suit, and the rule of law with respect to proof of lost profits being that past profits upon which the prediction must be made, that to the extent of past profits the loss may be shown from experience and from accounting records and acounting data and the like, which must be shown, and not be left to mere guess or surmise or conjecture or upon hope or expectation not founded upon past experience.

11. Lost profits have not been proved with reasonable certainty, because the evidence shows that the plaintiff intended to wash the bottles, the bottles containing the wine, and wrap each of them in tissue paper before reselling them.

The Court: It seems to me that was left undecided; in other words, left in the air.

Mr. Naus. No. It is hardly left in the air. It is worse than being merely in the air. I would like to add one further sentence to that.

The Court: Go ahead.

Mr. Naus: No proof of the labor cost thereof,

nor has it been shown what capital would be used by the plaintiff in the conduct of their transactions in this line, and the amount of interest upon that capital. [387]

12. That the plaintiff not only has failed to make such a showing of loss of anticipated profits as is required by the law, but, in the alternative, the plaintiff has also failed to prove the amount of any outlay by it in preparation for performance in lieu of the proof with reasonable certainty of lost profits.

(The motion was then argued by respective counsel and a recess taken until 2:00 p. m.) [388]

Afternoon Session, March 20, 1944, 2:00 P. M.

The Clerk: Park, Benziger & Co. v. Bercut, et al.

The Court: The motion for a directed verdict is denied.

Mr. Bourquin: If your Honor please, I take it that you intend to give counsel the opportunity to discuss the instructions this afternoon?

The Court: Well——

Mr. Bourquin: I am not asking for that, but what I was going to suggest was this, that in view of the fact that Mr. Olshausen has more familiarity with this than I have, and is handling the matter of instructions, if it might be agreeable to your Honor that I be excused. I have some things to look after, which I should like to attend to, unless I am needed here.

The Court: I have no objection if you wish to be excused.

Mr. Naus: The reporter may note an exception to the denial, your Honor.

Mrs. Herzig: At this time, your Honor, plaintiff would also like to make a motion for a directed verdict on all issues other than the issue of damages.

The Court: Are we going to have some argument on this?

Mrs. Herzig: That is what I would wish to do at this time, if you will give me permission.

The Court: When will we get through with this matter?

Mrs. Herzig: If you would like, I will simply make the motion and submit it on the basis of the memorandum of points and authorities, that I have prepared.

The Court: The motion is denied.

I will now take up the matter of instructions under Rule 51 of the Federal Rules of Civil Procedure. I shall state to you the [389] order in which I expect to give these instructions, and, of course, that will mean that it will not be in accordance with the numbers of the proposed instructions submitted by either side. So you will have to watch your instructions carefully so that you may note each one and will be prepared to hereafter address the Court upon them.

I shall give plaintiff's instruction No. 1, striking out on lines 15 and 16 the words, "to sell and deliver 60,000 cases of wine." Have you that instruction?

Mr. Naus: Does your Honor desire for us to wait until the conclusion of your entire announcement?

The Court: Yes. Make notes now on your instructions and then you can make statements or arguments hereafter.

I shall give Plaintiff's instruction No. 7. If I go too fast for you will you let me know?

Mr. Naus: I shall.

The Court: I shall give defendants' request No. 2. These instructions will be followed by what I call our stock instructions. Those instructions are the instructions usually given by the court in civil cases with which both sides are familiar.

Mr. Naus: That is in accordance with the usual practice of this court.

The Court: Yes.

Mr. Naus: That is perfectly satisfactory. I would simply like to draw attention to one of the usual stock instructions.

The Court: Yes.

Mr. Naus: The presumption that evidence wilfully suppressed would be adverse if produced. That is under section 1963 of the Code of Civil Procedure, one of the stock instructions.

The Court: I do not think that is in my instructions. I am [390] not sure.

Mr. Naus: That is an instruction commonly given.

The Court: I see no objection.

Mr. Naus: It is a stock instruction.

The Court: Following the stock instructions, I will give plaintiff's No. 2. I will slightly change the introduction. Instead of saying, "The Court instructions," I will say, "I instruct you."

I shall give plaintiff's instruction No. 3, amended as follows: striking out the initial words, "The Court," I shall substitute in lieu thereof, "I"—"I instruct you." And lines 13, 14, 15 and 16, I will strike out the words, "and that Park, Benziger & Co.. Inc., the plaintiff, was thereafter entitled to receive performance of the contract from the defendants."

I shall give plaintiff's instruction No. 5-F. Briefly stated it reads, "The law does not require an assignment to be in any particular form."

I shall give plaintiff's instruction No. 5-E.

Mr. Naus: The ones that I have are not numbered beyond 5-D. May I have the identity of 5-E?

The Court: Yes. I will read it to you:

"If by its terms the obligations of a written contract are expressly made——"

Mr. Naus: I have found it.

The Court: I shall give that. I shall give plaintiff's instruction No. 6, amended as follows: After the date, "January 29, 1943," line 18, I shall add the words, "and that the contract was not terminated." Have you got that?

Mr. Naus: There is only one place——

The Court: Line 18 after, "January 29, 1943."

[391]

Mr. Naus: The difficulty is, what was served on me is not numbered, and there are two places where January 29th appears in the unnumbered copy I have.

The Court: Line 18.

Mr. Olshausen: Mr. Naus is correct. The copies we served on him were not given numbers.

The Court: It is three lines from the bottom.

Mr. Naus: "And that the contract——"

The Court: "And that the contract was not terminated after January 29, 1943."

I shall give plaintiff's instruction No. 9.

Also plaintiff's instruction No. 8, inserting on line 11, after the word "contract," the phrase, "And if you find the original contract was not abandoned," set off in commas.

Mr. Naus: May I look at counsel's? I still cannot identify where that is by number. The rules require them to serve it by number and I can't find it.

The Court: I am sorry. They ought to have done it, of course. It is on the next to the last line after the word "contract."

Mr. Naus: Thank you, your Honor.

The Court: "Contract, and if you find the original contract was not abandoned."

Mr. Naus: Thank you.

The Court: I shall give plaintiff's No. 11, as amended. Have you got it there?

Mr. Naus: I have an 11, but I do not know what amendment means.

The Court: I will give it to you if you will listen. I am striking out the initial words, "you are instructed that." [392] The instruction will then begin, "The defendants." Strike out the word

"herein." Then I strike out all of the second paragraph.

I am giving all of defendants' request No. 3.

I shall give plaintiff's instruction No. 12 as amended. Strike out the first sentence. On line 11, or take the second paragraph, after the words, "If you find that," I insert the words, "the circumstances show," and strike out the words, "there was."

I shall give defendants' request No. 4.

I shall give defendants' request No. 5 amended by inserting the words on line 9 after the word "abandoned," the words "by all parties."

I am giving defendants' request No. 1.

I am giving defendants' request No. 6.

I will give defendants' request No. 17 amended as follows: strike out on line 10 the words, "was a partner or." Also strike out after the word, "adventurer" on the same line the words "of or." Insert on line 11 after the name "Park, Benziger," the following: "and that he signed on behalf of the joint venturer."

I shall give plaintiff's instruction No. 5(c). Have you got that, Mr. Naus?

Mr. Naus: Yes, I have that.

The Court: Also plaintiff's 5(b).

I shall also give defendants' request No. 18, striking out on line 7 after the word "persons" the word "and."

I shall give defendants' request No. 7 and I am changing the word "could" on line 14 to "might."

Instead of "you could infer" it will read "you might infer." [393]

I shall give defendants' request No. 8; also defendants' request No. 9; also defendants' request No. 10; also defendants' request No. 11; also defendants' request No. 12.

I shall give defendants' request No. 14 amended as follows: On line 7 I am striking out the words, "It is more important to" and inserting in lieu thereof the words, "you may." On line 9 I am striking out the words, "The evidence at bar shows," and inserting in lieu thereof, "If you find from the evidence."

On line 11, after the word, "it" I am striking out the word "and" and after the word "are" I am striking out the word "therefore."

I did not have an opportunity to look at the New York General Corporation Law with reference to plaintiff's instruction No. 5(a). I have it in chambers but I have not had an opportunity to read it to see whether or not it supports that instruction.

Mr. Naus: I am prepared——

The Court: The Clerk has handed me the book now. Section 120 on page 80 of the General Corporation Law, McKinley's Consolidated Laws of New York, Annotated, Book No. 2, reads as follows:

> "Corporations have no power except where it is conferred upon them to enter into a partnership."

I suppose the law is the same as it is in California?

Mr. Naus: No. Would you like to hear from me on that?

The Court: I do not know whether I want to hear this minute or not.

Mr. Naus: Maybe you could defer it.

The Court: The Articles of Incorporation are not in evidence. We will take that up later. We will pass the matter of this instruction, plaintiff's No. 5(a). [394]

I shall give defendants' request No. 19 amended as follows: Inserting on line 10 after the word "exist" the following words: "And defendants relied on such representation in making the termination agreement," set off by commas. Did you get that?

Mr. Naus: Yes, your Honor.

The Court: I am giving plaintiff's No. 10.

I am giving defendants' No. 20, striking out the first word, "now."

I am giving defendants' request No. 21, also defendants' request No. 38.

I am also giving defendants' request No. 28 amended as follows: On line 7, after the word, "market," striking out the following words: "Accordingly we must turn to the other rule for measuring damages and"—striking out those words.

I am giving defendants' request No. 36.

I am also giving defendants' request No. 35 amended as follows: On line 3, striking out the

words, "have used" and inserting in lieu thereof the word "use."

I shall give defendants' request No. 31, striking out the initial word "now."

I shall give plaintiff's instruction No. 15 amended as follows: Have you got it?

Mr. Naus: Yes, your Honor.

The Court: Striking out on line 11 the figure "60,000" and inserting in lieu thereof "26,691." And striking out on line 12, after the word "inspected," the following words: "and if you find that said wines are unobtainable on the market."

Mr. Naus: Those words are being stricken out?

The Court: Yes. "And if you find said wines are unobtainable on the market," being stricken out, and inserting after the word [395] "exceeding" on line 15 the words "the amount of any such profit." Striking out the figures, "237,750." Have I made that clear?

Mr. Naus: Yes, your Honor.

The Court: "If your verdict is for the plaintiff, you will find for the plaintiff in a sum not exceeding the amount of such profits as and for general damages," striking out the figures and the dollar sign, "$237,750."

I am also giving defendants' request No. 39.

I shall give defendants' request No. 40.

I shall also give that instruction with which you are familiar, relating to pooling: "In arriving at your verdict you must not resort to the determination of chance; that is, you must not arrive at your

verdict by dividing by twelve, or any other number, the sum of the various amounts at which each of you would fix the verdict and then take the quotient as the verdict." That is under C.C.P. 6572.

Mr. Naus: Now, if you want the exceptions taken by each side first?

The Court: Just a minute. I expect to refuse to give the following: Defendants' request No. 23, defendants' request No. 26, defendants' request No. 27, defendants' request No. 24, defendants' request No. 25, defendants' request No. 13, defendants' request No. 15, defendants' request No. 16, defendants' request No. 22, defendants' request No. 29, defendants' request No. 30, defendants' request No. 32, defendants' request No. 33, defendants' request No. 34, defendants' request No. 37, plaintiff's request No. 1(a), plaintiff's No. 4, plaintiff's No. 5, plaintiff's No. 5(d), plaintiff's No. 13, plaintiff's No. 14, plaintiff's No. 16(a), plaintiff's No. 17, plaintiff's No. 15(a), plaintiff's No. 16. [396]

If I should change my mind in giving or the not giving of certain of these instructions I will notify you before the argument starts tomorrow. Now, Mr. Naus, do you wish to say something to me about one of these instructions——

Mr. Naus: On partnership?

The Court: Yes.

Mr. Naus: If the Court please, what I wish to point out to you is this, that the New York statute, for reasons that I will give and citations that I

will give you, has no bearing whatever upon this case.

The Court: Is the provision of the statute similar to the statute of California?

Mr. Naus: I know of none in California.

The Court: I thought there was some law in California relating to the matter.

Mr. Naus: I think there is. I have four points of law that I will cite to you, but I wish to first point out in addressing myself to those that the litigation here does not go to the internal administration of the corporation, but goes to the action of third persons. With that in mind I first cite the California Constitution, Article XII., section 15, which, speaking generally, goes to the proposition that a corporation organized outside of California cannot do business on any more favorable terms that a domestic corporation. And guided by that I next cite the Civil Code of California, section 345, and to point that citation I will say, if the Court please, that we had such a doctrine in California up until the Legislature of 1931, a doctrine known as ultra vires. What we are talking about here is whether they can go into the question, Is or is not a partnership ultra vires the corporation? In 1931, to section 345 of the Civil [397] Code there was added a paragraph that reads as follows:

> "No limitations upon the business, purposes or powers of the corporation or upon the powers of the shareholders, officers or directors, or the manner of exercise of such powers, con-

tained in or implied by the articles or by chapter 15 of this Title, shall be asserted as between the corporation or any shareholder and any third person."

Then the last sentence of that section reads—and I am just deleting parts that do not belong here—"This section shall extend to contracts and conveyances made by foreign corporations in this State and to all conveyances of real property situated in this State by foreign corporations."

So my first proposition here is that the instruction they are asking you to give is an instruction to the jury that a partnership as such was ultra vires of the corporation, this Park, Benziger & Co. Under the California constitution and the statute that is entirely out of place, because in litigation with a third person there is no room for the doctrine of powers or lack of powers. There only remains the question, What did the corporation do? If it entered into a partnership it is bound by it.

Next turning to the proposition No. 2 on that, I turn to the Uniform Partnership Act, itself, which has been adopted in California, and I cite two sections to be read in pari materia, to be read together. I first cite section 2396 of the Civil Code, which was one of the earlier sections of the act, which defines the word "person" as including corporations. Read that in connection with 2400, defining a partnership, and when you read those two together it is obvious that the purpose of the Uniform Partner-

ship Act was to do away with the old discussion in the books as to whether a corporation could end a partnership. [398]

Proposition No. 3. The record in this case shows no lack of power.

Proposition No. 4 is that, after all, these older cases that go to the question of whether a corporation could or could not go into a partnership have really been done away with by the body of modern law, as to which there is the rule in California, and the modern law cited in 80 A.L.R. page 1049, also in 19 Corpus Juris Secundum 398, that when instead of going into a partnership generally, a corporation enters into a joint commercial venture, it is given all the qualities and characteristics of a partnership so far as obligation and liability is concerned. Those are the four points. As I say, the first one is the main one: Notwithstanding anything in a foreign statute, notwithstanding anything in the article or not in the article, there is now no longer any room in California to entertain in any litigation between a corporation and a third person, a stranger—there is no room to entertain any discussion whatsoever of any infra vires or ultra vires, and that is all it goes to, and our constitution forbids foreign corporations from doing business on any more favorable terms than domestic corporations.

The Court: I am familiar with that.

Mr. Olshausen: As I understand it, my understanding is what your Honor said: The rule is substantially the same in New York and in California,

and in this case we put the New York law there because it was a question of the powers of a New York corporation. Now, what counsel attempted to say that California abolished the entire doctrine of ultra vires. I do not understand the amendment that way. First of all I will say, with respect to the very last point that counsel made, bringing in the [399] joint venture, we did not request a parallel instruction on joint venture. We merely requested our instruction on the power of this corporation to enter into a partnership. Now, the corporation has no power to enter into a partnership, and the question there is only the question as to the reliance by the Bercuts. The question that it has not right as against third persons, as I understand it, means that it cannot disclaim the contract as against the persons with whom it contracted, in other words, which in this case would be Hermann. The furthest that that California provision goes would be to say that it cannot disclaim it against Hermann. But the point is if Hermann is acting for the corporation, they know that, prima facie, Hermann cannot act for the corporation, because, prima facie, the corporation could not enter into a partnership with Hermann. Now, that is there and the jury is entitled to be instructed on that legal question, and, as I say, we adopted the New York law because this is a New York corporation, and the instruction that the corporation has no power to enter into a partnership is relevant so far as it goes.

The Court: Do you wish to call my attention, or rather except at this time to any instruction?

Mr. Olshausen: Yes, I do.

The Court: I think it would be proper for you to do that at this time.

Mr. Olshausen: Yes. That is what I wanted to do, and I will say this: That instruction was drawn on the supposition that the articles would be part of the record.

The Court: Is there any objection on your part, Mr. Naus, of my letting this evidence in now, those articles of incorporation?

Mr. Naus: Well, if they are offered now—I will say this: [400] I would rather put it this way: I will make no objection to your Honor's granting leave to reopen the case for the limited purpose of offering one document, but if the case is reopened and the document offered, I will then make an objection to the offer.

The Court: I was going to say if there was any objection——

Mr. Naus: There will be an objection, of course. Let it in over my objection. But I would rather that it take that form, so if it comes in the ruling will be clear as to the position I took on it and the objection I made. But, of course, as I say, reopening the case for that limited purpose of offering that one paper, and I know what the one paper is, I would not oppose the reopening for that purpose.

The Court: I will let you know later.

Mr. Olshausen: For the record, in the instructions given but modified, we except to the modifications of instructions 1, 3, 11 and 15. That merely

preserves the point on which the new trial was granted in the first place.

The Court: Yes.

Mr. Olshausen: I will take next the instructions that were granted on the defendants' request. I think I mentioned 11 there, but if I did not——

The Court: Yes, you did, you mentioned 11.

Mr. Olshausen: Yes. That is a different issue. Does your Honor want me to run over those quickly? In other words, I have them written down here. Does your Honor want to follow me as I call attention to them?

The Court: Just as you have them.

Mr. Olshausen: I have them listed by numbers here.

The Court: Those that you want to except to? [401]

Mr. Olshausen: Yes.

The Court: Go ahead.

Mr. Olshausen: Then in the instructions given at the request of the defendants, we except in so far as the instruction No. 3 implies that there may have been evidence of a written cancellation by the plaintiff.

The Court: Where is that now? Defendants' 3?

Mr. Olshausen: Defendants' 3, yes. It says here the contract may be abandoned by a written agreement, or an oral agreement or understanding partly in writing and partly oral, and then it goes on to say:

"If you find that on or about the 26th and

27th days of April 1943 Serge Hermann and plaintiff and the defendants herein mutually agreed to terminate or abandon the contract. . . ."

The Court: Your exception is based on what ground?

Mr. Olshausen: It is based on the ground that the motion of the plaintiff might be read back to be connected with the previous motion of a written agreement. There is no evidence that the plaintiff, himself, signed a written agreement.

The Court: The contract may be abandoned by a written agreement, or an oral agreement, or an agreement or understanding partly in writing and partly oral. By the way, that says plaintiff's instruction No. 1. That is not correct, is it?

Mr. Olshausen: No, that should be No. 2.

Mr. Naus: That came about because it was numbered No. 1 at the former trial.

Mr. Olshausen: We also except to that instruction as far as it refers to an agreement that is partly in writing and partly oral, on the ground there is no such agreement as to either [402] plaintiff or his assignor.

The Court: All right.

Mr. Olshausen: The next is instruction No. 4. We except to that on the ground that the defendants rely on a written instrument, and that all other acts are excluded by the operation of the written instrument. They do not rely on acts outside the written instrument.

Mr. Naus: I certainly do.

Mr. Olshausen: No. 5. We except to it in so far as it discusses the question of revival, because there is no issue of revival in the case.

The Court: Next?

Mr. Olshausen: The next one was No. 1. We except to that on the ground that there is evidence on behalf of the plaintiff that Hermann was the agent of the Chateau Montelena, from which it can be inferred that there was a difference, and consequently there should be no categorical instruction that they are exactly the same.

The Court: I do not know whether it would make any difference one way or the other whether the instruction was given. I think it states the facts. It states what the evidence shows.

Mr. Olshausen: It states what some of the evidence shows.

The Court: You may proceed.

Mr. Olshausen: The next one is No. 6. We except to that on the ground that it is too broad and invites the jury to determine questions of law. It says, "You must therefore consider and determine the relationship between Serge Hermann and the plaintiff."

Now, that partly involves a question of law which should not be submitted to the jury, and, furthermore, the instruction [403] says because it was signed only by Serge Hermann, you must, therefore, consider the relations. Now, the second sentence does not follow from the first one.

The Court: All right.

Mr. Olshausen: The next one is 17. We except to that on the same grounds that we except to the

refusal of our instruction 5(d). In other words, one joint venturer cannot abandon.

18. We except to that one on the same grounds. And 7 again involves the same point. We except on the ground there is no evidence showing that Hermann acted on behalf of the joint venturer and not on behalf of himself.

No. 8 we except to only in so far as we claim there is no issue of partnership to be submitted to the jury.

No. 9 we except to on the ground that we take the position that there is insufficient evidence of a joint venture to submit to the jury.

No. 12, I believe, is an attempt to state ostensible agency, but I think an incorrect attempt. It says:

> "I further instruct you that in this lawsuit the question is not merely whether there was a joint adventure as between Serge Hermann and the plaintiff, but whether as between them on one side, and the defendants Bercut on the other, there was one; and in such situation the relationship of joint adventurers may be determined by you from the apparent purposes and the acts and conduct of Hermann, Elman and Benziger, because the law says that the acts and conduct of parties may speak above their expressed declarations to the contrary."

Now, up to those words, the words "acts and conduct of the parties," it is an attempt to state the law of ostensible [404] agency, but it does not state it. It does not set forth the elements. It merely says, "You have to decide whether it was a joint

venture between the plaintiff and the plaintiff's assignor on the one side and the defendants on the other. The last words are quoted from one of the cited cases, I believe from the universal sales corporation case, and they are quoted in connection with a case merely. It says you can have an implied contract. In other words, you may imply a contract from the acts of the parties which, of course, deals with an actual contract, an actual agency, and not merely an ostensible agency, and it is using the law on an implied contract in an instruction which attempts to cover the question of ostensible agency.

Next is 19, and there again we make the same exception as to the refusal of our instruction 5(d), that it assumes that one joint venturer has the power to cancel for the others, and furthermore, it leaves out the element which your Honor added in one of the other instructions, that the cancellation may not purport to have been on behalf of the joint venturer, because this simply says that if there is an ostensible joint venture, the plaintiff is bound by the acts, but it leaves out the point that even if there is an ostensible joint venture, the cancellation still might have been made by Hermann on his own behalf.

The next one is 38. We except to that the same way that we except to the modification of our instruction No. 1. That reserved the earlier point.

The next is 36. We except to that because it puts the burden on the plaintiff of proving the O.P.A. limitations on their own case. In other words, it says:

> "In first arriving at the amount of gross profits as a basis from which to make the necessary deductions to [405] determine net profits, I instruct you that you cannot in any event use a greater mark-up by plaintiff over the cost to it than the mark-up permitted under O.P.A. regulations as a price ceiling; and the burden of proof is on the plaintiff."

Now, it is not clear just the burden of proof of what, but it sounds as if he is saying you have to prove the O.P.A. maximum, and I do not believe that is part of the plaintiff's case.

On 35 the instruction is that the 50 percent selling commission which was to have been paid to Hermann is to be deducted—that is, in the first place, it is made a categorical instruction; in the second place, I think it is contrary to all the evidence, as even the defendants' witnesses refer to the contract as being a participation by Hermann in the net profits. In other words, Hermann possibly could have joined as plaintiff but did not, and the fact that the plaintiff may have divided its recovery with somebody else is no concern of the defendants. But this categorical instruction tells them that the 50 percent has to be deducted.

The Court: It is a part of the expense, isn't it?

Mr. Olshausen: Not if it is a participation in the net profits. At very least the instruction would have to be, "If you find it one thing, it is one thing, and if you find the other way, it is the other way." This categorically states they have to deduct 50 percent. I think that is certainly incorrect.

The other point is our conception of the evidence is both the plaintiff and the defendants agreed that this was to be a participation in the net profit, and so would not be deductible from the net profits afterwards. But certainly a categorical in- [406] struction to deduct 50 percent. I think it is incorrect.

The next is No. 31, and I believe, first of all, the sentence right after the footnote 1, that is not peculiar to the law of sales alone. I do not know that there is any point in instructing them excepting on the law of sales when it is a sales case. Now, in the second place, I think that the damages were proved definitely, and that there is no occasion for an instruction on guesswork, and from that standpoint we except to it as not being supported by evidence.

The next is instructions 39 and 40, and I want to take 40 first. I have a case here which I did not have this morning, and to which I call your Honor's attention. It is Gilson v. F. S. Royster Guano Co., 1 Fed.(2d) 82. It is the Third Circuit Court of Appeals, and particularly with reference to instruction No. 40 I think it is directly contrary, because this says if they offered it for cash in advance—now, this case is also a cash-in-advance case—and the counter offer was for cash in advance, and while they put it on the ground that it required them to waive their right to damages otherwise, and distinguished Lawrence v. Porter, and the Stoddard case —no, they distinguished Lawrence v. Porter—I think this is the latest case on the subject—and as I read it it is contrary to instruction 40. In instruc-

tion 36 we have the same problem, the requirement to accept a counter offer, that is, a contract under different terms, and the same general rule which is in this Gilson case would eliminate instruction 39 also.

Then in the refusal of our requests we except to the refusal of 1-A, 4, 5, 5-B, 13, 14, 15-A——

The Court: 16-A?

Mr. Olshausen: Yes, 16—— [407]

The Court: 16-A.

Mr. Olshausen: 16-A I have here, and 16 is, too; I haven't come to it yet. Yes. 16. That simply again is the same point which came up, in part, at least, on the granting of the first motion for a new trial, and 16 is the same way, 16-A. That is all.

Mr. Naus: If the Court please, in so far as the defendants' requests that you state you intend to give or are to be given in a modified form, we except to the indicated modifications, and I follow them as I go along, and only in one instance do I find any change which I would consider some change in substance, and upon comparing it I think it tended to improve the instruction rather than harm it.

Then as to defendants' requests refused, I was just in the course of checking them over, because not knowing in advance of the trial what course this case might take as to price and the like, we included instructions with regard to the whole case that perhaps no longer have to be treated as a necessary request. We consent to the rejection of defendants' request No. 13. We except to the refusal to

give defendants' request No. 15, because that is the only request for instruction in the case bearing upon the element of contribution of services, time, energy, skill, and expenses by Hermann, and putting him into the class of a joint adventurer and taking him out of the class of an employee.

We also except to the refusal to give defendants' request No. 16 upon the ground that that is the only request in the case and the only instruction bearing upon the subject of the test of participation in losses as well as in profits, and is the only request for instruction in the case telling the jury in consider- [408] ing whether there should be a participation in losses to create either a partnership or a joint venture, that loss of time, travel, hotel money and the like would be a sufficient loss to meet that test.

We acquiesce in the refusal of defendants' request No. 22 because it is no longer needed at the conclusion of the case.

We acquiesce in the refusal of our request No. 23, similarly as to our 24 and our 25 and our 26 and our 27—you will note as we go along many of these drop out because we are no longer dealing with market value.

We acquiesce in the refusal of our request 29, dealing with outlay, because the plaintiff ended up without making proof of outlay. Similarly as to 30. We except to the refusal to give our request No. 32 in that in none of the requests on either side that you indicated you were going to give is there any

instruction to the jury upon this matter in the case.

The Court: What is it?

Mr. Naus: The matter of whether or not as to the Bercut wine, the labeling of it under their own label and starting out with that whether the Park, Benziger Company were starting out with a new venture, putting it in the field of speculation. We except to the refusal of that request because——

The Court: Isn't that covered by 31?

Mr. Naus: I will have to look at that.

The Court: I have had these instructions so long I want to be sure that I do not become confused.

Mr. Naus: It deals with the same field as 31, except 31 deals with the matter of speculation generally, but 32 deals with the more narrow question that the evidence deals with.

The Court: Isn't that dealt with generally? When you say [409] conjecture and speculation you have said everything you can about it.

Mr. Naus: I doubt it, because when we are dealing with a new business or a new branch of an old business, and the jury have the case given to them, knowing the court knows it could be found to be a new business or a branch of an old business, they may think they have been invited by the court to consider that they could grant damages.

The Court: Only in this sense, that they are engaged in the business of marketing or selling California wine. They were in the wine business. They imported wine. They sold whisky. They could be described as a new branch or a new venture related to California wines.

Mr. Naus: We will except to the refusal to give our request No. 32 in that in no other instruction and in no other request is the jury being instructed on the narrow question with respect to an attempt to claim expected profits in a new enterprise.

We except to the refusal to give defendants' request No. 34 in that in refusing to give that request the court is taking entirely out of the case the rule of Hadley v. Baxondale with respect to the knowledge or ignorance at the time of the contract of January 29th as modified by the modification of February 3, 1943 with respect to whether either or both of the Bercuts had knowledge or were ignorant at that time that if they thereafter did not deliver the wine it could not be obtained elsewhere; that we consider the jury is entitled to be instructed upon that subject. We know nothing in form or substance in the request as given in any way contrary to law, and by refusing that request the court is refusing to instruct the jury on that subject. [410]

We except to the refusal to give defendants' request No. 27 in that in refusing that request the court is refusing to tell the jury at all that they may take into consideration the freedom from hazard and responsibility and risk of the plaintiff that the non-performance by the defendant has afforded.

Mr. Brownstone: That is 37.

Mr. Naus: 37, yes. That that is the only instruction upon the subject, so far as I know, it is proper in form and substance, and by the refusal of that request No. 37 it would appear to us that the court

is refusing to instruction at all upon that subject. Now, as to the plaintiff's instructions given, turning to plaintiff's request No. 7, our exception to that is one that the court might possibly be willing to cure, because I notice in other instructions the court did cure it. It starts out: "You are instructed if you find defendants repudiated their contract." That assumes, of course, the contract was never terminated or canceled. I except to that in that that does not limit it to a repudiation of an uncanceled contract, and might lead to confusion. All I wish in that connection is to clarify it to the extent of saying you can only consider repudiation in connection with a contract which is found otherwise not to have been canceled.

The Court: What are you objecting to there, the use of the word "repudiate"?

Mr. Naus: No, to leave the instruction as written except in the second line before the word "contract," strike out the word "their" between repudiated and contract. Strike out the word "their" and iinsert—well, change the instruction to read, "a contract not terminated or canceled." I think the instruction is otherwise sound. [411]

The Court: The objection then is to the use of the word "their"?

Mr. Naus: No, the objection is to the instruction as a whole in so far as it assumes the contract was never terminated. If the jury are told—the jury can be told about repudiation. It says here, "You are instructed if you find defendants repudiated their con-

tract." Well, that is confusing. They may have repudiated the contract in the sense of refusing to deliver any wine, but they may be justified in that refusal if the contract had been terminated or abandoned.

The Court: I do not know whether I can improve that or not. The trouble with these instructions is you can't put everything into one instruction.

Mr. Naus: I grant that.

The Court: I ought to be able to do that. All right. What is next?

Mr. Naus: Before you pass that, may I say this: The only kind of contract that can be repudiated is one that is in force, and when you use the word "repudiated," it excludes the idea of abandonment. If all members of the jury were scholars of the middle ages and trained in the law, they might follow that instruction. I can't quite follow it, and I persist in the exception.

The Court: Very well.

Mr. Naus: We except to the giving of plaintiff's instruction No. 3, the three opening lines of it, where it says, in its amended form: "I instruct you that the assignment of a contract transfers to the assignee all the right and title of the assignor." We except to that in that there is an implication there that is given to the jury that the assignee takes only the rights [412] and benefits and does not take along with it any burdens.

The Court: The statement is correct, however.

Mr. Naus: Well, it is as correct as any half truth I ever saw.

The Court: Go ahead.

Mr. Naus: We except to the giving of plaintiff's instruction No. 5-E, in that it either misstates the record as to the fact or else it is abstract and not concrete. It says, "If by its terms the obligations of a written contract are expressly made binding upon the successors and assigns of the parties thereof"—Mr. Mitchell, may I have the contract? From that your Honor would be justified in supposing they read the contract and the contract read that way, when, as a matter of fact, to the extent that the words, "and assigns" are in that instruction, it is a false instruction. If you will read paragraph 11 of the contract you will find no basis in the record for it.

The Court: What is your exception?

Mr. Naus: My exception to the giving of 5-E, then, is that the jury in effect are told that the obligations of this contract were binding upon Park, Benziger by reason of the terms of the contract, itself, when, as a matter of fact, the instruction is contrary to the terms of the written contract, paragraph 11 of the written contract, and is also contrary to the record of this case, which contains nothing whatever to the effect that either the plaintiff company, or Park-Benziger, ever expressly assumed or agreed to perform the obligation of the contract.

The Court: I suppose I could read that portion of the contract to the jury.

Mr. Naus: But still that would not help, because the in- [413] struction, itself, is a misdirection to the jury.

The Court: I presume a lot of them are misdirections.

Mr. Naus: What I mean to say is, there you are in effect telling the jury because of something in this case—you are telling them as a matter of law Park-Benziger assumed obligations here, and there is nothing in the record to support it, and the only piece of the record they point to to support it turns out not to be supporting when you look at the piece, that is to say, that part of the contract.

The Court: Personally, I do not think it is important at all, whether it is in or out. Personally, I do not think it makes any difference whether I give it or whether I refuse it. However, I note your exception.

Mr. Naus: Now, we except to the giving of plaintiff's instruction No. 6, in that the instruction is in the nature of a formula and it excludes from the consideration of the jury in determining whether the plaintiff was entitled to performance whether or not any legal effect is to be given to the voluntary disablement of Louise Hermann by letting her license lapse on February 28th, and in effect tells the jury that the plaintiff was entitled to performance from the defendants whether Louise Hermann or Chateau Montelena of New York remained able to perform or not, contrary to the rule

for which we contend, that a mere assignment does not relieve the assignor of the obligations of the contract, but the assignor must remain able to perform.

We except to the giving of plaintiff's instruction No. 9, which under the state of circumstances excuse the plaintiff from performance when, as a matter of fact, the plaintiff is never excused from the duty of Louise Hermann to continue able [414] to perform by maintaining a license.

We except to the giving of plaintiff's instruction No. 12, which in the modified form starts out by reading, "To constitute an abandonment of a contract there must exist on the part of all parties concerned". We except to that on the ground that by instructing the jury in that form, a secret intention in the mind of one of the parties would be sufficient to satisfy the instruction, when the law is concerned not with a secret unmanifested intention, but is concerned with an intention manifested by the act of the parties, and in the context here, manifested by the apparent mutual intention of all the parties. We except to it on the ground that it permits the witness Elman, for example, to have had an unconstituted or unmanifested intention in his mind until Hermann signed, and then came out afterwards to say he never had any other intention.

We except to the giving of instruction 5-C in that it is abstract and would only tend to confuse the jury. If there be a joint venture here, as we think there is—but I say if there be one here, whatever transaction was entered into was not certainly en-

tered into on his own behalf alone. There is nothing in evidence here showing that once he assumed a joint venture that he performed some act on his own behalf alone.

We except to the giving of plaintiff's instruction 5-B to the extent that in there it says that one of the tests of a joint venture is the existence of an equal right on the part of each joint adventurer to direct and govern the conduct of the other. We except to it upon the ground that there may be a joint venture whether all the parties have a right or not, and in any event, even if the different parties have some right, the law does not require an equality of right. [415]

Also under the fourth element given by instruction 5-B, under the subdivision (d) it reads, "close and even fiduciary relationship between the parties," we except to it upon the ground that in that instruction 5-B the Court purports to give to the jury four elements of a joint venture, when a close or fiduciary relationship is never an element but simply is the result of a joint venture if the elements otherwise exist. So the Court is giving us an element something that is not an element at all.

We except to the giving of plaintiff's instruction No. 10 upon the ground, first, that it speaks of the plaintiff's ability or inability as being a matter of defense for a defendant. On the contrary, we say that in every case where a plaintiff sues for a breach of contract, one of the implications of his complaint and one of the elements of his position is

that he be at all times able to perform, and that shifts the burden that rests upon a plaintiff to make a showing of ability into a defense upon the defendant of a showing of inability.

We except to the instruction further upon the ground that regardless whether the burden is upon the plaintiff or upon the defendant the Court instructs the jury that it is not necessary for the plaintiff to have had ability to perform independently of the credit that would obtain by getting the wine through performance by the other party. And we except to the instruction on the further ground that the Court not only puts the burden of a showing of inability on the defendant, but makes that be tested by the presence or absence of insolvency. I submit the matter.

The Court: Mr. Olshausen, do you wish to reply to any of Mr. Naus' statements? [416]

Mr. Olshausen: The only thing I remember is his criticism of that instruction based on Beck v. Cagle, 46 Cal. App.(2d), which states the elements of a joint venture. I believe it is our instruction. It is one of the five lettered instructions, and I will say that instruction is quoted word for word from that case. When he criticizes it he is simply criticizing the case.

Mr. Naus: As a matter of fact, I criticize not the case, but I can say right now it is a first class lifting job of copying from the opinion, and I still except to it.

Mr. Olshausen: The others, I think, are only points which have been raised before.

The Court: I do not know whether I have overlooked anything or not.

Mr. Olshausen: I will say on that 50 percent instruction—that same point—I have looked at it again and it is worded in such a way that it sounds like a mandatory instruction. In the second place, on that question, where the plaintiff has to share in his recovery, and the point that is an out for the defendant, your Honor refused instruction 5. Perhaps there are formal objections to it. I won't go to instruction 5, itself, but I would like to call attention to these two cases at the bottom of instruction 5, and which apply to the same thing. They state the general law that I had in mind when I tried to take exception to that 50 percent instruction, that if the plaintiff was under duty to divide the recovery with another person who does not sue, that is a question purely between the plaintiff and the third person, and not a question for the defendant. I just call those two citations to your attention: One is Russ v. Tuttle, 158 Cal. 226; the other is [417] Concordia Fire Insurance Co. v. Commercial Bank, 39 Fed.(2d) 826.

The Court: The only instruction that I have not given you definite information about is that one with reference to partnership.

Mr. Olshausen: My information on the law is as I stated. Now, I could check Mr. Naus' statement that the ultra vires has been entirely abolished in California once more and I could either tomorrow morning or the first thing tomorrow morning——

The Court: Could you be here at half past nine?

Mr. Naus: We could determine that by looking at the code section right now.

The Court: Do you mean the California code?

Mr. Naus: Yes, the Civil Code. The Ballentine revision of 1931. They simply have done away with ultra vires as to a corporation on one side and a shareholder on the other, a shareholder and an officer. It is a family fight. It is no longer a part of the law.

Mr. Olshausen: As I say, I can check that, and if there is anything to add I can add it tomorrow morning.

The Court: Would it inconvenience you gentlemen if I ask you to come tomorrow morning at half past nine? Could you be here at half past nine?

Mr. Naus: I just happen to have—if I could make a deal with the Yellow Cab Company——

The Court: Make it ten.

Mr. Naus: I do not think it will take any more than a minute. I have said all I want to say about it.

The Court: Make it ten o'clock. Bring it up before the jury is brought into court. [418]

(An adjournment was thereupon taken until tomorrow, Tuesday, March 21, 1944, at 10:00 o'clock a. m.) [419]

Tuesday, March 21, 1944, 10:00 o'clock A. M.

The Court: Park, Benziger & Co. v. Bercut, on trial.

Mr. Olshausen: On this matter of the instruction that the plaintiff had power to enter into a partnership under New York law—that is No. 5(a) —I have looked at the code section 345, California Civil Code, and the law substantially construing it, or commenting on it, and I have come to the conclusion that our instruction is correct, and, consequently, we still keep the request. There is one other matter. It is that in case it is necessary for the record we state that the grounds upon which we have taken exception to the instructions refused or modified—we are of the opinion and take the position that the instructions as requested were correct statements of the law and supported by the evidence.

The Court: I shall refuse to give Plaintiff's Instruction No. 5(a) which refers to the matter you have just referred to. I received word from my secretary that the defendant wished to withdraw request No. 19.

Mr. Naus: I so informed your secretary, and I so informed Mr. Olshausen before court convened this morning. That is correct.

The Court: Request No. 19 is withdrawn.

Mr. Naus: Withdrawn.

The Court: Referring to the defense request No. 36, yesterday I stated that I expected to give that instruction. I now advise counsel that I will give the instruction, but I shall delete therefrom

the following: "And the burden of proof is on the plaintiff." That is the last clause or phrase in the instruction. You may have an exception to that, Mr. Naus, of course. [420]

Mr. Naus: No, I don't think so, your Honor, because I take it in your stock instruction you will deal with the burden of proof, so I take no exception to that deletion.

The Court: Very well. Defense request No. 35, I stated yesterday I expected to give that instruction. I shall strike from that instruction the last sentence. The last sentence reads: "In addition to those deductions you must also deduct the 50% selling commission which was to have been paid by the plaintiff to Serge Hermann because that would be clearly a selling expense of the plaintiff if Serge Hermann were only an employe or salesman on commission instead of a partner or joint adventurer."

Mr. Naus: If the Court please, I except to the refusal to give that instruction upon the ground that the instruction is a correct statement of the law as applied to the facts here, and the matter covered by that instruction the jury should know, because it goes to the heart of the case on the question of damages. Also, if the Court please, Rule 51 has never become entirely clear to me yet. It requires, of course, the judge to announce before the argument begins what the instructions are, but the exceptions may be taken before the jury retires to deliberate. With that in mind may we understand that all exceptions taken by me yesterday and this

morning shall be deemed to be renewed at the time the arguments conclude and before the jury retires?

The Court: In compliance with Rule 51.

Mr. Naus: Yes.

The Court: Yes.

Mr. Olshausen: Yes. Of course, if that is necessary, we would make the same request.

The Court: Yes. [421]

Mr. Naus: I don't know whether it is necessary; I am in doubt about it.

The Court: Well, I think it is just as wise to have an understanding about it. All exceptions taken by both parties apply under the provisions of Rule 51. Now, gentlemen, I think we will be in recess for five minutes, and then we will bring the jury in and we will start with the arguments.

(The arguments of respective counsel were then presented to the jury and an adjournment was taken until tomorrow, Wednesday, March 22, 1944, at 10:00 o'clock a. m.) [422]

Wednesday, March 22, 1944, 10:00 o'clock A. M.

The Clerk: Park, Benziger & Co. v. Bercut, et al.

The Court: Bring in the jury.

Mr. Bourquin: Mr. Naus called my attention to this morning that there may be various fictitious defendants—well, here is the jury.

The Court: I suppose what you wish is an order entered dismissing as to all fictitious defendants?

Mr. Bourquin: Yes, your Honor.

The Court: The Clerk will make that entry.

CHARGE TO THE JURY

The Court (Orally): This is an action between Park, Benziger & Co., Inc., a corporation, as plaintiff, and Pierre Bercut and Jean Bercut doing business as P. & J. Cellars, defendants. The action is brought for breach of a contract under which the defendants agreed to sell and deliver certain specified quantities of wine. The plaintiff alleges that the contract was assigned to it and that after the assignment, but before the time for performance by the defendants, the defendants repudiated the contract and refused to perform the same. Refusal to perform before the time for performance is known as anticipatory breach.

The plaintiff sues for damages for said alleged anticipatory breach of defendants' contract.

You are instructed that if you find that the defendants repudiated their contract with plaintiff either by telling plaintiff that they would not perform or by acts inconsistent with defendants' continued performance of their obligation under the [423] contract, then the plaintiff may sue immediately for breach of the contract.

The defendants Bercut admit that they did not deliver any of the wine mentioned in the contract, and they defend on the ground that the contract was canceled or terminated by mutual abandonment on April 27, 1943.

It is the duty of the Judge to instruct you as to the law that is applicable to this case, and it is your duty, as jurors, to follow the law as given to you in these instructions.

I charge you that it is your exclusive province to determine the facts in the case, and to consider the evidence and value of the evidence. You are not bound to decide in conformity with the declarations of any number of witnesses which do not produce conviction in your minds, against a lesser number or against a presumption of law or evidence which satisfies your minds; in other words, it is not the greater number of witnesses which should control you where their evidence is not satisfactory to your minds, as against a lesser number whose testimony does satisfy your minds.

The testimony of one witness entitled to full credit is sufficient for the proof of any fact and would justify a verdict in accordance with such testimony even though a number of witnesses on the other side might testify to an opposite state of facts, if, from the whole case, the jury believes that the greater weight of the evidence considering its reliability and the credibility of the witness is on the side of the one witness as against the greater number of witnesses.

In civil cases a preponderance of evidence is all that is required, that is, such evidence as, when weighed with that opposed to it, has more convincing force. [424]

In weighing the evidence you are to consider the credibility of witnesses who have testified in the case. You are the sole and exclusive judges of their credibility. For the purpose of determining the credibility of the witnesses you may take into con-

sideration their conduct; their character, as shown by the evidence; their manner on the stand; their relation to the parties, if any; their interest in the case; their bias and prejudice, if any; their degree of intelligence; the reasonableness or unreasonableness of their statements; and the strength or weakness of their recollection. A witness is presumed to speak the truth. This presumption, however, may be overcome by the manner in which the witness testifies, by the character of his testimony, or his motives, or by contradictory evidence.

A witness false in one part of his testimony is to be distrusted in others; and if you are convinced that a witness has wilfully sworn falsely as to a material point, you must treat all of his testimony with distrust and suspicion, and reject it all unless you shall be convinced, notwithstanding the base character of the witness, that he has in other particulars sworn to the truth.

You should not consider as evidence any statement of counsel made during the trial, unless such statement is made as an admission or stipulation conceding the existence of a fact or facts.

You must not consider for any purpose any evidence offered and rejected, or which has been stricken out by the court; such evidence is to be treated as though you had never heard it. You are to decide this case solely upon the evidence that has been introduced before you and the inferences which you may deduce therefrom, and such presumption as the law may deduce therefrom as stated

in these instructions, and upon the law as [425] given you in these instructions.

If you find that evidence has been suppressed, you may infer that it would be adverse if produced.

I instruct you that the contract between Chateau Montelena of New York and the defendants, dated January 29, 1943, and modified by letter dated February 3, 1943, was a contract for the sale of merchandise in the ordinary course of business, the assignment thereof was not prohibited by statute nor by the contract itself, and that said contract was assignable.

I instruct you that the assignment of a contract transfers to the assignee all of the right and title of the assignor in the contract.

You are instructed that the Chateau Montelena of New York assigned the contract dated January 29, 1943 between Chateau Montelena of New York and Pierre Bercut and Jean Bercut doing business as P. & J. Cellars, to the plaintiff, Park, Benziger & Co., Inc.

The law does not require an assignment to be in any particular form.

If by its terms the obligations of a written contract are expressly made binding upon successors and assigns of the parties thereto, no express assumption of those obligations by an assignee thereof is necessary.

The court instructs you that when the assignor of a contract has performed or offered to perform all the requirements of said contract imposed upon

him prior to the assignment, and that thereafter the assignee has performed or offered to perform all the requirements of said contract imposed upon him, the assignee is entitled to performance of the contract from the other party. [426]

If you find that the assignor Chateau Montelena of New York performed or offered to perform all the requirements of the contract of January 29, 1943, on its part prior to the assignment thereof, and that after said assignment, the plaintiff, Park, Benziger & Co., Inc., performed or offered to perform on its part all of the requirements of the contract dated January 29, 1943, and that the contract was not terminated, you should find that the said plaintiff was entitled to performance from the defendants.

The court instructs you that when one party to a contract notifies the other party that he will not perform the obligations of the contract, this repudiation excuses further performance by the other party.

If you find that on or about the 27th day of April, 1943, the defendants repudiated the contract of January 29, 1943, and refused to perform said contract, you should find that the plaintiff was excused from further performance.

You are instructed that an offer of substantially different terms from those in the contract between the parties, stated with the intention not to perform the original contract, constitutes a repudiation of the contract by the party making said offer.

If you find that the defendants offered to plaintiff

"three cars for cash" and other cars to be decided upon later, if at all, with the intention not to proceed with the original contract, and if you find that the original contract was not abandoned, you will find that the defendants repudiated and breached their contract with the plaintiff.

Defendants claim that the contract involved in this case was abandoned by mutual consent of the defendants and the plaintiff. You are instructed that abandonment is an affirmative [427] defense and that the burden of proving the same by a preponderance of evidence rests upon the defendants.

A contract can be mutually abandoned by the parties before performance begins or at any stage of their performance and each of the parties released from any further obligation on account of such contract. The contract may be abandoned by a written agreement or an oral agreement, or an agreement or undertaking partly in writing and partly oral. The fact of such abandonment can be established by evidence of the acts and declarations of the parties. If you find that on or about the 26th and 27th days of April, 1943, Serge Hermann and plaintiff and the defendants herein mutually agreed to terminate or abandon the contract, plaintiff's Exhibit No. 2, then, and in such event, your verdict should be for the defendants.

To constitute an abandonment of a contract there must exist on the part of all parties concerned an actual intent to abandon together with unequivocal, positive acts inconsistent with continued performance of the contract.

If you find that the circumstances show no actual intent on the part of the plaintiff, Park, Benziger & Co., Inc., to abandon said contract of January 29, 1943, then you should find against the defendants on the alleged defense of mutual abandonment.

The inference of abandonment may arise either from a single act or from a series of acts. The question is whether there was an abandonment, not whether it is evidence by one act or by many.

When a contract has been once mutually abandoned, it cannot thereafter be revived or restored to life by one of the parties alone because he changes his mind, even though the change [428] of mind may occur in the next minute or hour or day after the mutual abandonment occurred. If you find from the evidence that the contract of January 29, 1943, was mutually abandoned by all parties at the moment that Serge Hermann signed and delivered the paper of April 27, 1943, then I instruct you that the contract could not be thereafter revived or restored to life without the assent or consent of the Bercuts.

The evidence shows that "Chateau Montelena of New York" was simply a business or trade name adopted or used by the wife of Serge Hermann in connection with the wine contract with the Bercuts, and that Serge Hermann had complete and entire charge of the business dealings under the name of Chateau Montelena of New York. I therefore instruct you that for the purposes of the present lawsuit you are to consider Serge Hermann and Cha-

teau Montelena of New York as one and the same, and the act or conduct of either as the act or conduct of the other, and any mention of either in these instructions shall be deemed to include the other or both.

The evidence shows that the paper of April 27, 1943 was signed only by Serge Hermann. You must therefore consider and determine the relationship between Serge Hermann and the plaintiff, Park, Benziger & Co.

The cancellation or termination writing or paper of April 27, 1943, is signed by defendants Bercut and by Serge Hermann for Chateau Montelena of New York, the same parties who were the parties to the original contract of January 29, 1943. If you find from the evidence that on April 27, 1943, when the writing or paper of that date was signed Serge Hermann was a joint adventurer with the plaintiff, Park, Benziger & Co., and that he signed on behalf of the joint venture, then I instruct you that [429] under the circumstances of this case the plaintiff was bound by Serge Hermann's act and signature in signing on April 27, 1943, and your verdict should accordingly be in favor of defendants Bercut.

Transactions which one joint adventurer makes on his own behalf alone do not bind the other joint adventurers.

To constitute a joint adventure, there must be at least (a) a community of interest in the object of the undertaking; (b) an equal right to direct and govern the conduct of each other with respect there-

to; (c) share in the losses if any; (d) close and even fiduciary relationship between the parties.

Each one of two or more joint adventurers has power to bind the others in matters within the scope of the joint enterprise, in dealings with third persons, regardless of any limitations or authority that may have been agreed between the joint adventurers, if the third person is unaware of the limitation of authority at the time of acting.

The plaintiff, Park, Benziger & Co., claims that Serge Hermann was merely employed by it as an employee or salesman working on a commission of 50% of net profits. The defendants Bercut claim that Park, Benziger & Co. and Serge Hermann were either partners or joint adventurers in the matter of the Bercut wine. If, as plaintiff claims, Serge Hermann was merely an employee or salesman, then Park, Benziger & Co. would not be bound by Hermann's act in signing the paper of April 27. However, if as the defendants Bercut claim, Hermann was either a partner of, or joint adventurer with, Park, Benziger & Co. in the matter of the Bercut wine, then you might infer from the whole of the evidence that Park, Benziger & Co. were bound by the act of Hermann in signing the paper of April 27. [430]

A partnership is an association of two or more persons to carry on as co-owners a business for profit.

A joint adventure is something like a partnership but is not identical with it. A joint adventure is an

association of two or more persons or corporations to carry out a single business enterprise for profit. It is usually although not necessarily limited to a single transaction, although the business of conducting it to a successful termination may continue for a number of years. The name "joint adventurer" is applied to those special combinations of two or more persons or corporations, where in some specific venture a profit is jointly sought without any actual partnership or corporate designation.

In considering whether or not a relationship such as that of joint adventurers or partners has been created, the law is guided in part by the acts of the parties, and is not limited to their spoken or written words.

In determining whether or not there was a joint adventure, you shall not fasten your attention upon any one paper or any one term of a paper or any one act alone to the exclusion of everything else. You should consider the whole scope of the arrangement and each part of it should be considered in relation to all other parts. Look at the arrangement as a whole.

I further instruct you that in this lawsuit the question is not merely whether there was a joint adventure as between Serge Hermann and the plaintiff, but whether as between them on one side, and the defendants Bercut on the other, there was one; and in such situation the relationship of joint adventurers may be determined by you from the apparent purposes and the acts and conduct of Hermann, Elman and Benziger, because the law says

that the acts and conduct of parties may speak above their ex- [431] pressed declarations to the contrary.

Of course, the wages or compensation of a mere employee or salesman may be measured by a percentage of the profits of a business, but in determining whether there was a joint adventure you may inquire whether the person who renders or is to render the services is himself the promoter or an original party to the enterprise. If you find from the evidence that Serge Hermann was the promoter of the whole enterprise, and the original party to it, you are at liberty to infer that he was a joint adventurer rather than a mere employee or salesman.

I instruct you that the defendants have raised the defense of plaintiff's alleged inability to pay for wine which the plaintiff purchased under the contract. You are instructed that the defendants were not justified in repudiating the contract unless the plaintiff were actually insolvent. The burden of proving such a defense is on the defendants. You are instructed that no evidence has been offered tending to show that the plaintiff is or ever was insolvent. Mere doubts of the solvency of the other party afford no defense to the party who refuses to perform the contract according to its terms because of such suspicion.

With respect to the occurrences on April 26 and 27 in 1943 one of the two results is true: either the original contract of January 29, 1943, was cancelled or terminated by mutual abandonment when

the paper of April 27, 1943, was signed and delivered, or else it was repudiated by the defendants Bercut. If you find that there was such a termination on April 27, then your verdict must be in favor of defendants Bercut, and there is no need for you to consider anything further. If you find that instead of such termination there was a repudiation of the [432] original contract, then your verdict should be in favor of plaintiff, Park, Benziger & Co., and accordingly you would need to consider how to measure the amount of damages suffered by it.

I will instruct you on the subject of the measure of damages because it is my duty to instruct you as to all the law that may become pertinent to your deliberations. I, of course, do not know whether you will need the instructions on measuring damages, and the fact that I give them to you must not be considered as intimating any views of my own on the issue of liability or as to which party is entitled to your verdict. It is for you to determine from the evidence whether the plaintiff was bound by the agreement of termination or cancellation dated April 27, 1943. If it was, your verdict should be in favor of defendants Bercut. If plaintiff was not bound, then you will be guided by the instructions as to how to measure the amount of plaintiff's damages.

Although the agreement dated January 29, 1943, purports to be for the sale of 60,000 cases of wine, a price is fixed for only 26,691 cases and the price for the remainder of 33,309 cases was left to be

determined by future negotiations which never took place. Under such circumstances the contract must be treated as one for the sale of only 26,691 cases. If you find that plaintiff is entitled to recover, you will ascertain the damages, if any, suffered by him on the basis of a contract for the sale of only 26,691 cases of wine.

I instruct you that the evidence before you is insufficient to show that the goods were obtainable elsewhere, that is, it is insufficient to show an available market. On the contrary it shows no available market. The rule in such case is that the measure of the buyer's damages is the loss directly and naturally resulting in the ordinary course of events from the seller's breach [433] of contract, which rule as specifically applied to this case now before you means that, if you find there was a breach, either (1) the amount of the buyer's outlay of expense in the course of preparing to carry out the contract before he knew that the seller would not perform, or (2) the net profits, if any, that the buyer was reasonably certain to have made if the seller had performed the contract.

In first arriving at the amount of gross profits as a basis from which to make the necessary deductions to determine net profits, I instruct you that you cannot in any event use a greater markup by plaintiff over the cost to it than the markup permitted under OPA regulations as a price ceiling.

The term "profits," as I use it in these instructions, does not mean gross profits. "Gross profits" are really not profits at all within the contemplation

of the law, for they generally refer to the excess in the selling price over the cost price without deducting the expenses of resale and other costs of doing business. If a buyer is entitled to an award at all because of loss of profits, the award must be confined to net profits. "Net profits" are the gains from sales after deducting the expenses of doing business, together with the interest on the capital employed.

Even though the law lays down the rule that in case of a seller's breach of an obligation to deliver goods not obtainable elsewhere the buyer's damages may be measured by his loss of profits, nevertheless the buyer must make proof showing that it was reasonably certain that the profits would have been made. Guesswork or conjecture or speculation cannot be used as a substitute for proof. That is not peculiar to the law of sales alone, but is applicable to all civil actions for damages for [434] breach of contract. Not only must the plaintiff prove the breach, but he must also prove the damages by a sufficiency of evidence as distinguished from guesswork or conjecture.

I instruct you that breach of contract for the sale of goods by the seller of said goods prior to the delivery thereof when there is no market on which the goods can be purchased entitled the plaintiff to the loss of profits reasonably certain to have been realized by said plaintiff on the entire contract.

If you find that the plaintiff suffered a loss of profit on 26,691 cases of wine, and you find that

said profit could reasonably have been expected, and if your verdict is for the plaintiff, you will find for the plaintiff in a sum not exceeding the amount of such profit.

In the instructions I have given you thus far I have given you the general rules for measuring damages. I further instruct you, however, that a buyer who claims damages from a seller for non-delivery of the goods is always under a duty to minimize or mitigate his damages, that is, to keep them down if reasonably possible. There is conflicting testimony before you as to the amount of wine offered by Jean Bercut to plaintiff immediately after the cancellation agreement of April 27, 1943, was signed and delivered. If you find that he then offered to plaintiff only three carloads of the same wine for cash but otherwise at the contract price and terms, then you cannot award plaintiff any lost profits on those three cars, aggregating approximately 4500 cases, because plaintiff's duty to keep his damages down exists even though the Bercuts were the only source whence the wine could be obtained. The 26,691 cases covered by the contract must accordingly be reduced to the extent of the three carloads or approximately 4500 cases.

[435]

If you find that immediately after the cancellation agreement of April 27, 1943, was signed and delivered, Jean Bercut offered to the plaintiff not merely three carloads but all of the 26,691 cases of wine on hand at the prices stated in the contract,

but for cash in advance, then in that event I instruct you that regardless of whether or not other wine was available elsewhere in the market, you cannot award to plaintiff any damages because of a market price in excess of the contract price, nor any damages because of loss of anticipated profits. The only damage to plaintiff through paying cash in advance would be limited to interest for the use of the money for the short period of time between the date of cash payment in advance and the time of arrival of the wine at destination thereafter when the plaintiff would otherwise have been required to pay the draft attached to the bill of lading for each carload.

In arriving at your verdict you must not resort to the determination of chance; that is, you must not arrive at your verdict by dividing by twelve, or any other number, the sum of the various amounts at which each of you would fix the verdict and then take the quotient as the verdict.

You must weigh and consider this case without regard to sympathy, prejudice, or passion for or against either party to the action. It is the duty of the jurors to deliberate and consult with a view to reaching an agreement, if they can do so without violence to their individual judgment upon the evidence under the instructions of the court. Each juror must decide the case for himself or herself, but should do so only after a consideration of the case with fellow jurors, and a juror should not hesitate to change his or her views or opinions on the case when convinced that they are erroneous. No

juror should vote [436] for either party, nor be influenced in so voting, for the single reason that a majority of the jury should be in favor of such party. In other words, you should not surrender your honest convictions concerning the effect or weight of evidence for the mere purpose of returning a verdict solely because of the opinion of the other jurors. Your verdict must be unanimous.

There have been prepared for your convenience two forms of verdict; the first, after the entitlement of court and cause, reads as follows: "Verdict. We, the jury, find in favor of the plaintiff and assess the damages against the defendants in the sum of (blank) dollars." Then there is a place for the signature of the foreman. The second form reads as follows, after the entitlement of court and cause: "Verdict. We, the jury, find in favor of the defendants," and then follows a blank space for the signature of the foreman.

When you have arrived at your verdict, if you find in favor of the plaintiff the foreman will fill out the form I have described and write therein the amount of damages you have found, and after the verdict has been arrived at the foreman will sign the verdict and you will be returned to court, where it may be delivered.

The jury may now retire.

Mr. Bourquin: Your Honor, may I address your Honor under the Rule 51 to complete our record? I desire to add an additional objection and exception to the charge, and to the instruction which

your Honor has modified, since the agreement with respect to the exceptions and as modified was given. The plaintiff desires to assign as error the giving of the instruction which I take it is defendants' No. 36 as modified and as given, wherein that in- [437] struction assumes that the O.P.A. regulation or ceiling affected plaintiff's resale price.

The Court: Yes.

Mr. Bourquin: We make the objection upon the ground that there is no evidence or proof of the application of such a regulation to the prices in question upon the plaintiff's part, and the evidence of Elman is uncontradicted that the suggested August, 1943 markup regulation did not affect prices theretofore established, and upon the further ground that the price for resale of this wine was fixed and established in April and May, 1943.

The Court: I regret the necessity for mentioning that at this time. I thought we had devoted most, or the greater part, of Monday to a discussion of the instructions and hearing exceptions in that regard.

Mr. Bourquin: Because, your Honor, my associates advise me that the proposed form of instruction which I now object to was not the subject of objection before, that the instruction as now given was not the form proposed but was another form, and there has been apparently a modification to meet the objection that was made, but this objection is not in the record.

The Court: I announced yesterday morning, I

think it was yesterday morning, that I had modified that instruction in certain particulars by striking out the last clause of it. That was the only change that was made in it, the only modification that was made in it. Do you wish to say anything, Mr. Naus?

Mr. Naus: I submit the matter. I will say nothing at this time, because it was fully covered by stipulation yesterday. This is in violation of it.

The Court: That is my understanding of it. The jury will now retire. [438]

(The jury retired at 11:00 a. m., and at 2:25 p. m. court was convened in the absence of the jury.)

The Court: I received a request from the jury which reads as follows: "Please get us copy of O.P.A. price regulation on retail and wholesale prices effective sometime during August, 1943."

I set aside Monday, March 20th, for the purpose of considering instructions to the jury in accordance with the provisions of Rule 51 of the Federal Rules of Civil Procedure. At that time I undertook to inform counsel of my proposed action upon the requests prior to their arguments, in accordance with the provisions of that section of the code. I now ask the reporter to read the record in reference to defense request No. 36.

The Reporter (reading): "The Court: I am giving defense request No. 36."

Sometime subsequent: "Mr. Olshausen: The next is 36. We except to that because it puts the burden on plaintiff of proving the O.P.A. limitations on their own case." Mr. Olshausen read the instruction.

The Court: I am wondering if the instruction as read by Mr. Olshausen ought not to be placed in the record. It reads as follows:

> "In first arriving at the amount of gross profits as a basis from which to make the necessary deductions to determine net profits, I instruct you that you cannot in any event use a greater markup by plaintiff over the cost to it than the markup permitted under OPA regulations as a price ceiling; and the burden of proof is on the plaintiff." [439]

Proceed.

> The Reporter (reading): "Now, it is not clear just the burden of proof of what, but it sounds as if he is saying you have to prove the O.P.A. maximum, and I do not believe that is part of the plaintiff's case."

The Court: Was anything said by Mr. Naus in reply to that?

The Reporter: No, sir.

The Court: What happened the following morning, Tuesday morning, March 21, with reference to that defense request 36?

> The Reporter (reading): "The Court: Referring to the defense request No. 36, yesterday I stated that I expected to give that instruction, but I shall delete therefrom the following: 'And the burden of proof is on the plaintiff.' That is the last clause or phrase in the instruction. You may have an exception to that, Mr. Naus, of course.

Mr. Naus: No, I don't think so, your Honor, because I take it in your stock instructions you will deal with the burden of proof, so I take no exception to that deletion."

The Court: Now, will you read, please, what Mr. Bourquin said this morning with reference to that same matter?

The Reporter (reading): "Mr. Bourquin: Your Honor, may I address your Honor under the Rule 51 to complete our record? I desire to add an additional objection and exception to the charge, and to the instruction which your Honor has modified, since the agreement with respect to the exceptions and as modified was given. The plaintiff desires to assign as error the giving of the instruction which I take it is defendants' No. 36 as modified and as given, wherein that instruction assumes that the O.P.A. regulation or [440] ceiling affected plaintiff's resale price.

"The Court: Yes.

"Mr. Bourquin: We make the objection upon the ground that there is no evidence or proof of the application of such a regulation to the prices in question upon the plaintiff's part, and the evidence of Elman is uncontradicted that the suggested August, 1943 markup regulations did not affect prices theretofore established, and upon the further ground that the price for resale of this wine was fixed and established in April and May, 1943."

The Court: What did I say?

The Reporter (reading): "The Court: I regret the necessity for mentioning that at this time. I thought we had devoted most, or the greater part, of Monday to a discussion of the instructions and hearing exceptions in that record."

The Court: In that regard, I suppose.

Now, gentlemen, my recollection is that Mr. Bourquin was not here at the time on Monday when I mentioned defendants' request No. 36. My recollection is that Mr. Bourquin had asked to be excused and had left the court-room when that instruction was under consideration. Is my recollection correct?

Mr. Bourquin: That is mine, your Honor. That is in accord with my recollection.

Mr. Naus: That is correct.

The Court: He was not present. Now, it seems to me that the objection that was made this morning was not timely. It was not proper. It was not in accordance with the provisions of Rule 51. It was not within the provisions of the rule. But we are confronted now with a situation here of having the jury [441] request the court to give the testimony with reference to this O.P.A. regulation. Now, it may be that I ought to have instructed the jury that the burden of proof was upon the plaintiff to offer proof of the provisions of the O.P.A. I was influenced by the objection that was made by the defendants in that regard. I thought that perhaps

I ought not to require or to place the burden on the defendants to make that proof——

Mr. Bourquin: You mean the plaintiff, your Honor?

The Court: Yes. Maybe I ought not to have done that. Maybe I was in error in striking out that clause. Now, I take it you both agree there is no evidence here as to what those prices were.

Mr. Naus: No, I do not agree with that, your Honor. May I refer to the record?

Mr. Bourquin: I wouldn't go that far.

The Court: There is no evidence here as to what the O.P.A. regulations were as to price ceilings.

Mr. Naus: May I point to the record?

The Court: Yes.

Mr. Naus: I would like to make just two comments: First, with respect to the state of the record under Rule 51, the record is complete and accurate as far as the reporters have read it back. But there was another objection at another stage in it that I am sure they have in their notes. At the conclusion of that session on Monday, the 21st, when each of us had taken all the exceptions that we desired, I arose and suggested to the court that there was some doubt in my mind as to whether under Rule 51 the parties had made a sufficient taking of exceptions by taking them on Monday, or whether we would be required to repeat them in the presence of the jury; so in effect, by [442] colloquy between your Honor, Mr. Olshausen and myself, it was agreed that the taking of exceptions at the conclusion of the Monday afternoon session should be

complete and be deemed to cover the exceptions taken just before the retirement of the jury, so that we have not merely this rule, but we have the acquiescence.

The Court: The thought being that it would not be necessary to repeat them again before the jury retired.

Mr. Naus: The thought went even deeper. The thought was we had our full opportunity in court that day to take any exceptions we chose.

The Court: That was my idea of it.

Mr. Naus: That is what I understood I was doing. Secondly, passing from that, I point to page 179 of the transcript as typewritten by the reporter, the question beginning at line 11 and the answer given at line 18, and if your Honor desires, I will be glad to read it.

The Court: Read it.

Mr. Naus (reading): "Mr. Bourquin: Before you testify to that——

"The Witness: If I have been qualified as an OPA expert, maybe I will get a job.

"Mr. Naus: No, I am not trying to qualify you as anything—as an expert in that respect. I am merely meeting on cross examination what you purport to say on direct examination, Mr. Elman. At that I think you are doing as well as many of them down at the OPA, as I have observed them. I am asking you whether you know that in the month of August 1943, beginning then and continuing ever since, you

have been under an OPA ceiling of 25 per cent in your [443] markup. A. Yes."

The Court: What line is that?

Mr. Naus: Line 18 on page 179.

The Court: What volume is that?

Mr. Naus: It is the second volume. The day is March 16th.

The Court: I remember that testimony.

Mr. Bourquin: May I read the rest of that, your Honor, the rest of that testimony? May I borrow that copy of the transcript? I did not bring mine up.

Mr. Naus: Surely.

Mr. Bourquin: Immediately following that, Mr. Naus continued to question the witness and he said:

"Q. So that had this contract been carried out, under these price lists or anything else, for three months, beginning with the fourth car and continuing under this contract, you could in no event have sold at a greater markup than 25 per cent; now, you know that, don't you?

"A. No, I don't think so. At least, my understanding of it would be that since our price was established prior to this one, the price fixing of the merchandise took place before this law came out and subsequent to that. It differentiates—it says anything you purchase from this time on shall be at a fixed mark-up. Our contract and purchase of the wine happened prior to this. We had already established an

OPA price on that merchandise. I doubt very seriously whether this would have meant a retention in price. So far as I am concerned, I don't believe it would have. We would have kept the same prices."

The Court: What page is that? [444]

Mr. Bourquin: 179, and what I read began at line 19 and ran to 180, line 3.

The Court: Mr. Naus started at line 11.

Mr. Bourquin: Mr. Naus started at line 11.

The Court: You read from line 11 to what?

Mr. Bourquin: To 180, line 3 inclusive.

The Court: Will counsel stipulate that I may send a note to the jury, the foreman of the jury, calling their attention to Volume 2 of the transcript of testimony, page 179, beginning at line 11 and continuing to and including line 3 of page 180?

Mr. Bourquin: Plaintiff will, your Honor.

Mr. Naus: Yes, and I might also add, if the Court please, in that connection——

The Court: Listen. You stipulate to that?

Mr. Naus: Yes.

The Court: Anything else you say to me you are talking to me, of course.

Mr. Naus: Yes, your Honor. But in connection with that, and having in mind that, I stipulate that any part of the transcript, including that part, that part alone, or any other part your Honor desires, may go to the jury.

The Court: May I send all the transcript of the testimony that I have to the jury?

Mr. Bourquin: Yes, your Honor.

Mr. Naus: Yes, your Honor.

The Court: I haven't made any marks in it.

Mr. Naus: We wouldn't care about that.

The Court: Well, I haven't.

Mr. Naus: I merely want to add in this connection the view [445] of the defendant with respect to the present situation. It is our position, and I believe the law to be, that as to these regulations that have been published in the Federal Register, the regulations of a government agency, the Court has judicial knowledge of.

The Court: I do not think there is any doubt about that.

Mr. Naus: With that in mind I think, if the Court please, that in connection with that, and having in mind that anything the Court judicially knows the whole branch of the Court knows, the Court can have its recollection refreshed or can choose of its own motion to bring judicial matters to the attention of the jury.

The Court: I think I could bring the jury in.

Mr. Naus: At this time, if the Court please, I have with me the original regulation as to that 25 per cent markup. It is designated NPR445, dated August 9, 1943. I will ask Mr. Mitchell to hand it to your Honor, and I will ask Mr. Brownstone, who has a copy of it, and who is more familiar with that than I, myself, and who has studied it, to point out any part your Honor wishes brought to your attention or make any statement concerning it which you wish to hear.

The Court: I wonder if it would not confuse the jury if we sent this in to them, or whether it wouldn't be better to call their attention to the testimony in the transcript and let it go at that? If the jury is still in doubt about the matter and wishes further instructions, we have this bulletin which we can refer to, and if necessary I can read to them on the subject. I do not think it is necessary, in view of the stipulation, to send this in.

Mr. Naus: In that connection, and having that in mind, we [446] feel confident of our position as to judicial knowledge of the law, and the application here, we think the regulation is perfectly clear on the subject——

The Court: If you will just mark that——

Mr. Naus: (continuing) ——and we would suggest that, in accordance with your judicial knowledge of the regulation in question, that you, under the circumstances, give to the jury an additional or special instruction stating to them that beginning as of August 9, 1943, and continuing down to the present time there is a percentage markup maximum of 25 per cent on the sale by Park-Benziger of this wine to anybody, either wholesaler or retailer, or to anyone, not for consumption.

The Court: I will not do that at this time, Mr. Naus.

Mr. Naus: Very well.

The Court: But if there should be any further request from the jury upon the subject, I will entertain a request from you in that regard.

Mr. Naus: Very well.

The Court: But I should like to be fully advised as to what this bulletin contains so that I may intelligently speak to the jury about it.

Mr. Naus: Do you wish to defer that, or take it up now?

The Court: I think you had better prepare something so if called upon later for something additional, I can give it to them.

Mr. Naus: I believe Mr. Brownstone has already typed something on it, but it may be longer than your Honor needs.

Mr. Brownstone: This is our memo (handing a document to the court).

The Court: I do not know whether the other side would be [447] willing to stipulate in that regard. If they are, then that would shorten the matter.

Mr. Naus: I believe Mrs. Herzig has had some connection with the O.P.A. She should know.

Mrs. Herzig: I know there are other regulations than this one, Mr. Naus. For example, the General Maximum Price Regulation; and I do not feel that the jury would be helped by this.

Mr. Naus: All I am interested in, Miss Herzig, is this: There may be memorandums, bulletins, or what-not from time to time, but there never has been any change since that date of August 19, 1943 in the maximum mark-up of 25 percent in a sale of domestic wine by a wholesaler to either another wholesaler or to a retailer.

Mrs. Herzig: That, in itself, Mr. Naus, is a change from a prior regulation.

Mr. Naus: Granted. I say that it took effect August 9, 1943. I grant you previous to that it was different, but I am saying beginning August 9, 1943 down to the present date there has never been any change in that basic ceiling or maximum of a 25 percent mark-up on domestic wines sold by a wholesaler to either another wholesaler or to a retailer.

Mrs. Herzig: It is my impression, although I do not suppose it is an authority on this regulation, that if the price was approved by OPA prior to this date, that price still prevails.

Mr. Brownstone: I will state in answer to that, Mrs. Herzig, I have gone into all these regulations very carefully, and that is just not so. Your 25 percent limitation applies to anything.

Mrs. Herzig: That is not my impression, and you people ques- [448] tioned Mr. Elman when he was on the stand and then produced nothing to controvert his testimony.

The Court: It may be that any proof in regard to that should have been given by the plaintiff.

Mr. Naus: I am firmly of that view.

The Court: It seems to me, listening to what Mr. Olshausen had to say about that, I was justified in striking out that clause or sentence in which I said that the burden is on the plaintiff. There isn't any question but what the Court may take judicial knowledge of the practice with reference to the OPA or any regulations which have been adopted in conformity with or in accordance with the provisions of the statute. So if there is any further question

from the jury with reference to this matter, it will be necessary for the court to look into the provisions of the statute and the regulations of the OPA and determine what it shall instruct the jury upon that question, and such instruction, of course, would be based upon the judicial knowledge of the court in that regard.

My thought is if it is possible to shorten the matter, I think counsel should do it—and when I say shorten it, I mean rather than have the court read lengthy provisions of the statute, the regulations, you could agree as to what the law is, it might be better for all parties concerned. However, I have your stipulation as to what I shall say to the jury with reference to the testimony that has been given upon the matter, and I shall instruct them accordingly.

Mr. Naus: You still have that copy of the regulation up there?

The Court: Yes, I have.

Mr. Naus: Can your Honor turn to—well, let us see—these pages do not seem to be numbered. Oh, in small type down below in [449] the right hand corner, this says "Page 7."

The Court: Yes.

Mr. Naus: The third column on the right on that. You will find it says Section 5.4.

The Court: Yes.

Mr. Naus: Maximum prices for wholesalers.

The Court: Yes, I have it.

Mr. Naus: Generally, and then under that 1, 2, and then we come to B.

The Court: Yes.

Mr. Naus: Now, it is B that controls us—initial maximum prices—and then below that, down at the end of the text on B, you find a tabulation in small Roman numerals I, II and III. The small Roman II is your mark-up: 1.25 times the cost. That is a 25 per cent mark-up.

The Court: 1/25 of what?

Mr. Naus: It is 1¼ times the cost mentioned in the text. Going back to B, there, reading it:

> "A wholesaler's initial maximum price per case to retailers shall be his net cost per case figured according to section 523 in his latest base purchase of the item, or if he made no base purchase of the item since March, 1942, his net cost per case figured according to section 523 for his most recent purchase of the item from any supplier, except from another wholesaler, multiplied by the percentage mark-up for the item being priced as follows: 2: 1.25 for wine."

That is the way they write their percentage mark-ups. It is 1¼ times the price, which means add 25 percent to the original and you get 1¼. [450]

The Court: Yes.

Mr. Naus: If you desire to explore that backwards to the other sections you will find they talk about hard liquors, they talk about importing, all that having no relation to this, but you will find in the regulations as a whole, on a sale by a wholesaler to another wholesaler or to a retailer, in either event

it not being a sale for drinking, for consumption, that where such a sale is made, you can't charge more than the mark-up of 25 percent for wine.

Mrs. Herzig: I should like to call your Honor's attention to Article IV of this regulation, on page 6, Maximum price for sales of packaged domestic wine by processors. Mr. Elman, of Park, Benziger & Co., tells me that since this merchandise would be labeled P & B Brand, would bear his company's label, that he comes within the class of a processor. Now, I believe that is sound, his contention is correct, and under that section it states——

The Court: Article what?

Mrs. Herzig: Article IV on page 6 at the bottom of the first column on the left-hand side.

The Court: Oh, yes, I see it.

Mrs. Herzig: He tells me that this regulation states:

> "Until further provisions of Article IV. are issued and become effective, maximum prices for sales or offers to sell packaged domestic wine by processors are to be determined according to the provisions of the General Maximum Price Regulation or Price Supplementary Regulation No. 14 issued by the Office of Price Administration as may be applicable."

It is his understanding that that is where he comes in [451] and under the General Maximum Price Regulation, the March 1942 price is the ceiling price.

Mr. Brownstone: If the Court please——

The Court: I do not want to hear any further argument on the matter, gentlemen. If I do I will call upon you.

(At 4:05 p. m. the jury returned into court with a verdict in favor of the plaintiff and fixing plaintiff's damages in the sum of $72,687.50.)

The Court: Do you wish to have the jury polled?

Mr. Naus: No, your Honor. May we have a 30-day stay?

The Court: Yes. Ladies and gentlemen, you are excused until further notice. You may now retire.

[Endorsed]: Filed April 7, 1944. [452]

[Title of District Court and Cause.]

ORDER

Ordered:

1. The motion for judgment under Rule 50(b) FRCP is denied;

2. The motion for new trial under Rule 59 FRCP is denied.

Dated: April 8, 1944.

A. F. ST. SURE
United States District Judge

[Endorsed]: Filed Apr. 8, 1944. C. W. Calbreath, Clerk. [453]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the above-named defendants hereby appeal to the Circuit Court of Appeals, Ninth Circuit, from the judgment entered against them in the principal amount of $72,687.50, based upon the verdict entered on or about the 22nd day of March, 1944, and from the whole of said judgment.

GEO. M. NAUS
LOUIS H. BROWNSTONE
Attorneys for said Defendants

[Endorsed]: Filed May 4, 1944. [454]

[Title of District Court and Cause.]

ORDER FOR TRANSMISSION OF ORIGINAL EXHIBITS

Upon request of the hereinafter consenting signatories:

The Court being of opinion that all of the exhibits received or marked at the trial of this action should be inspected by the appellate court and sent to the appellate court in lieu of copies pursuant to Rule 75(i) of the Rules of Civil Procedure, it is

Ordered that the Clerk of this District Court forward said exhibits to the Clerk of the United States Circuit Court of Appeals, Ninth Circuit, to

be held by the latter clerk for the use of the appellate court until the decision of the appellate [458] court on the appeal from the judgment taken by the defendants.

A. F. ST. SURE
United States District Judge

By consent:

ALFRED F. BRESLAUER
THELMA S. HERZIG
M. MITCHELL BOURQUIN
GEORGE OLSHAUSEN
Attorneys for Plaintiff

GEO. M. NAUS
LOUIS H. BROWNSTONE
Attorneys for Defendants

[Endorsed]: Filed May 9, 1944. [459]

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM PORTION OF JUDGMENT

To: The Clerk of the Above Entitled Court and to Messrs. Louis J. Brownstone and George M. Naus, their attorneys:

You and each of you will please take notice that plaintiff hereby appeals to the United States Circuit Court of Appeal of the 9th Circuit from that portion of the judgment entered in the above enti-

tled action limiting plaintiff's recovery to the sum of $72,687.50.

Dated: May 29, 1944.

ALFRED F. BRESLAUER
THELMA S. HERZIG
M. MITCHELL BOURQUIN
GEORGE OLSHAUSEN
Attorneys for Plaintiff.

(Acknowledgment of Receipt of Copy.)

[Endorsed]: Filed Jun. 3, 1944. [461]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 468 pages, numbered from 1 to 468, inclusive, contain a full, true, and correct transcript of the records and proceedings in the matter of Park, Benziger & Co., Inc., a corporation, Plaintiff, vs. Pierre Bercut and Jean Bercut, individually and as co-partners doing business as P & J Cellars, a co-partnership, First Doe and Second Doe, Defendants, No. 22625S, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on ap-

peal is the sum of $157.40 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 11th day of July, A. D. 1944.

C. W. CALBREATH
Clerk

(Seal) By E. VAN BUREN
Deputy Clerk [468]

[Endorsed]: No. 10823. United States Circuit Court of Appeals for the Ninth Circuit. Pierre Bercut and Jean Bercut, Individually, and as Copartners doing business as P & J Cellars, a Copartnership, Appellants, vs. Park, Benziger & Co., Inc., a Corporation, Appellee, and Park Benziger & Co., Inc., a Corporation, Appellant, vs. Pierre Bercut and Jean Bercut, Individually, and as Copartners doing business as P & J Cellars, a Copartnership, Appellees. Transcript of Record upon Appeals from the District Court of the United States for the Northern District of California, Southern Division.

Filed July 13, 1944.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit
No. 10823

PIERRE BERCUT and JEAN BERCUT, individually and doing business as P & J Cellars, a copartnership,

Appellants,

vs.

PARK, BENZIGER & CO., INC., a corporation,

Appellee.

STATEMENT OF POINTS AND DESIGNATION OF PRINTING

The following is a statement of the points on which the appellants intend to rely upon this appeal:

1. The court below erred in denying the motion of appellants for direction of a verdict in their favor, and they rely separately and severally upon each and all of the grounds of the motion.

2. The court below erred in denying the motions made by appellants under Rules 50(b) and 59 FRCP.

3. The court below erred in refusing to instruct the jury in accordance with Defense Requests numbered 15, 16, 32, 33, 34 and 37, on the grounds stated in the exceptions taken in due time at the trial to the refusal of the court below to grant those Requests.

4. The court below erred in modifying Defense Request No. 35 for an instruction, by striking out the last sentence of the Request, as excepted to at the time of the settlement of the instructions.

5. The court below erred in failing to give any instruction upon the burden of proof.

6. The court below erred in not instructing the jury that the maximum OPA markup was and is 25%, in response to the inquiry received by the Court from the jury during their deliberations.

Designation of Printing

Appellants therefore designate the following parts of the record which they think necessary for the consideration of the foregoing Points:

a. Pleadings.

b. Verdict.

c. The judgment entered by the clerk upon the verdict.

d. The whole of the stenographic reporter's transcript of the evidence and proceedings at the trial (which includes, in addition to the evidence offered and received, copies of some exhibits, the proceedings on settlement of instructions, and proceedings connected with receipt by the Court from the jury, during their deliberations, of a special inquiry from the jury).

e. The instructions requested by these appellants, being Defense Requests Nos. 1 to 40, both inclusive.

f. The motions made by these appellants under Rules 50(b) and 59 FRCP.

g. Our notice of appeal.

h. Order for transmission of original exhibits.

i. The following exhibits: Plaintiff's exhibits, 7 Permit; 9 Demand; 14 Retail price list; 15 Wholesale price list; and Defendants' Exhibit D, License.

k. This statement of points and designation.

GEORGE M. NAUS
LOUIS H. BROWNSTONE
Attorneys for appellants,
Pierre Bercut and Jean Bercut.
Address: 706 Alexander Building,
San Francisco.

Receipt of a copy of the foregoing Statement of Points and Designation of Printing, this 21 day of July, 1944, is hereby acknowledged.

ALFRED F. BRESLAUER
THELMA S. HERZIG
M. MITCHELL BOURQUIN
GEORGE OLSHAUSEN
Attorneys for Appellee.

[Endorsed]: Filed Jul. 21, 1944.

[Title of Circuit Court of Appeals and Cause.]

CROSS-APPELLANT'S STATEMENT OF POINTS ON CROSS-APPEAL

Cross-Appellant will rely on the following points in support of the cross appeal:

1. Under a proper construction of the contract

between the parties the court should have submitted the issue of damages to the jury on the basis of 60,000 cases instead of only 26,691 cases.

2. Alternatively and in any event the court should have submitted the issue of damages to the jury upon the basis of the number of cases (approximately 36,000) which were contracted to be shipped during the remainder of the year 1943 and during the year 1944 instead of on the basis of only 26,691.

3. Upon the issue of damages the court should have admitted evidence on the prices at which the defendant sold the wines in question after repudiation of their contract with plaintiff, said evidence being admissible either to prove market price and to show the difference between the contract price and market price or to prove value (if there were thought to be no market) and to prove the difference between the value and the contract price.

Note: The cross-appeal is filed solely to protect appellee in the event of another trial. In the event of affirmance upon appellants' appeal the cross-appellant desires cross-appeal to be dismissed.

ALFRED F. BRESLAUER
THELMA S. HERZIG
M. MITCHELL BOURQUIN
GEORGE OLSHAUSEN
Attorneys for Appellee, and
Cross-Appellant.

Receipt of copy of the foregoing Statement of Points on Cross-Appeal is hereby admitted this 19th day of July, 1944.

GEORGE M. NAUS
LOUIS H. BROWNSTONE
Attorneys for Appellants and
Cross-Appellees.

[Endorsed]: Filed Jul. 19, 1944.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF PRINTING

Appellee and Cross-appellant hereby designate the following parts of the record to be printed in addition to those parts already requested by appellants:

1. Plaintiff's requests for instructions to the jury.
2. Plaintiff's Exhibit 13-A (schedule of wine sales by the defendants).
3. Plaintiff's Exhibit 13-B (deposition).

ALFRED F. BRESLAUER
THELMA S. HERZIG
M. MITCHELL BOURQUIN
GEORGE OLSHAUSEN
Attorneys for Appellee.

Receipt of copy of the within Designation of Printing admitted this 25th day of July, 1944.

LOUIS H. BROWNSTONE
and
GEORGE M. NAUS
Attorneys for Appellants

[Endorsed]: Filed Jul. 25, 1944.